EH-6-83-004

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August 11, 1983

Permit File
NM0020389

Mr. Dick Whittington, P.E.
Regional Administrator
EPA, Region VI
1201 Elm Street
Dallas, Texas 75270

Dear Mr. Whittington:

Homestake Mining Company ("HMC") hereby requests, pursuant to 40 C.F.R. §124.74 an adjudication or evidentiary hearing in the matter of NPDES Permit No. NM-0020389. The following information is submitted:

1. The name and address of the person making the request is:

   Homestake Mining Company
   Post Office Box 98
   Grants, New Mexico 87020

2. HMC is the owner and operator of the Ion Exchange facility for which the Regional Administrator has determined to issue the above referenced Permit.

3. HMC represents no persons other than itself in this request.

4. Upon motion of any party granted by the Presiding Officer, or upon order of the Presiding Officer, sua sponte without cost or expense to any other party, the requester shall make available to appear and testify, the following:

   (i) The requester, through employees, consultants and agents, directors and officers of the requester having knowledge of the above referenced permit or facts concerning the discharge permitted by the permit or related facts. This statement does not constitute a waiver of any applicable legal privilege, and HMC requests that the EPA and any other interested persons and parties to this proceeding similarly make available witnesses for examination and cross-examination.

5. HMC requests an adjudicatory hearing in order to contest the EPA's jurisdiction and to contest the provisions and conditions contained in the proposed permit as being invalid and not in accordance with law. The particulars of each issue proposed to be considered at the hearing are set forth in item (6) below. HMC discussed the legal and factual issues it raises in this request in its comments of June 15, 1983, letter to EPA on the NPDES Permit No. NM-0020389 and incorporates those comments herein and the material submitted therewith as part of this administrative record. HMC anticipates hearing on the listed issues will take one or two days.

6. Legal and factual questions at issue, factual areas to be adjudicated, and their relevance to the permit decision are as follows:

   A. WHETHER THE EPA HAS NPDES DISCHARGE PERMIT JURISDICTION PURSUANT TO THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, PUBLIC LAW 92-500.

HMC believes that the discharge involved is not a discharge into "navigable waters" and that such discharge does not move into "navigable waters". Therefore, each and every provision of permit is void as being beyond the EPA's statutory authority.

The above described permit describes the receiving waters for the discharge as the "Arroyo del Puerto to San Mateo Creek" (Page 1). HMC submits that neither the Arroyo nor San Mateo Creek is a "water of the United States" as such term is used in the Federal Water Pollution Control Act Amendment of 1972, as amended (the "Act") and as such term has been construed by the courts in interpreting the Act. The EPA's jurisdiction under the Act covers only discharges into the waters of the United States. In support of its position, HMC points out that the Arroyo del Puerto at the place of discharge is neither a navigable water nor does the discharge move into a navigable water and that the discharge amounts to a discharge upon the surface of the land which is not within the scope of the Act.

HMC's predecessor, United Nuclear-Homestake Partners ("UN-HP"), filed an adjudicatory hearing request on June 4, 1976 on the jurisdiction of the EPA to issue a permit to UN-HP No. NM-0020389 (the predecessor of the proposed permit here). One of the issues raised by the applicant in its request for an adjudicatory hearing was whether EPA has NPDES discharge permit jurisdiction to issue a permit pursuant to Federal Water Pollution Control Act Amendments of 1972. An adjudicatory hearing was granted and the applicant filed a stipulation of facts unique to the applicant on June 14, 1978 by the parties. The parties agreed to submit to the Regional Administrator of Region VI as the sole record for use by the Regional Administrator the hearing record developed in the adjudicatory hearing involving Kerr-McGee Nuclear Corporation NPDES Permit No. NM-0020532 with the supplementary stipulation of facts. Applicant and the other parties briefed the issues and submitted proposed findings of fact and

conclusions of law in the matter of United Nuclear-Homestake Partners NPDES Permit No. NM-0020389. The Acting Regional Administrator entered an initial decision and findings.

HMC petitioned the EPA for review of the Regional Administrator's initial decision. HMC just received the Order of August 5, 1983 of the EPA Administrator denying Its Petition For Review. HMC plans to seek judicial review of the EPA's decision. Meanwhile, EPA has issued to HMC a new permit for which HMC submits EPA does not have jurisdiction. HMC asks that an evidentiary hearing be granted and that the matter be reheard. The entire permit should be stayed during the permit term until a final decision is made by the reviewing court and final agency action occurs on the newly issued permit.

HMC's arguments and factual grounds supporting its position that EPA does not have jurisdiction to issue the NPDES discharge permit issued on July 15, 1983 are largely contained in its Petition for Review, Proposed Findings of Fact and Conclusions of Law, Briefs, Stipulations and the Record In The Matter of United Nuclear-Homestake Partners, Grants, New Mexico NPDES Permit No. NM-0020389. However, there exists new evidence in that the amount of water discharged into the Arroyo and the water in San Mateo Creek has been substantially decreased. HMC submits and incorporates copies of the above documents:*

1. Stipulation and Agreement between the parties of June 14, 1978;

2. Stipulation of Facts between the parties of June 14, 1978;

3. Hearing transcript in the matter of National Pollutant Discharge Elimination System Permit for Kerr-McGee Corporation, Churchrock, New Mexico NPDES Permit No. NM-0020524 and Kerr-McGee Nuclear Corporation, Ambrosia Lake, New Mexico NPDES Permit No. NM-0020532;**

4. Testimony of Dr. Ganus;

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*. EPA holds the original record of this matter. Thus, any part of the record referred to in these comments is incorporated herein. Inasmuch as this proposed permit involves much of the same material as submitted in the record of In The Matter of UN-HP, NPDES Permit No. NM-0020389, it is the same proceeding for purposes of 40 CFR §124.13 and the record may be incorporated by reference.

**. References throughout these comments to testimony, exhibits and the transcript are to the Kerr-McGee transcript, which is on file with the EPA and is incorporated herein.

5. Brief and Reply Brief of United Nuclear-Homestake Partners, NPDES Permit No. NM-0020389;

6. Proposed Findings of Fact and Conclusions of Law of United Nuclear-Homestake Partners, NPDES Permit No. NM-0020389;

7. Petition for Review of Initial Decision of Regional Administrator in the Matter of United Nuclear-Homestake Partners Grants, New Mexico NPDES Permit No. NM-0020389.

The classification that the Arroyo del Puerto and San Mateo Creek are waters of the United States or navigable waters is factually erroneous.* HMC's discharge is to an arroyo for which the sole sources of water are the discharges derived from the Kerr-McGee and Partnership underground mines and intermittent precipitation. Upstream from the Partnership facilities the arroyo is dry except in time of precipitation. It flows only in direct response to precipitation, and receives no water from springs and no long continued supply from melting snow or other surface sources. The same would be true of the entire arroyo in the absence of the Kerr-McGee and Partnership discharges (Exhibits AL-3.A, 3.B, 3.C, and EPA 18 at 2. Ganus testimony at 3, 4; Duggan testimony at 2/Transcript at 149-150). Approximately three miles down gradient from the Kerr-McGee discharge point the Arroyo del Puerto converges with San Mateo Creek. The U.S. Geologic Survey in 1977 measured an average flow of 0.76 cubic feet per second at its guaging station on the Arroyo del Puerto approximately 1,000 feet up gradient of the confluence. (Ganus testimony at 5/Transcript at 247). The evidence showed the entire flow of the San Mateo Creek is normally absorbed into the alluvium. Typically this occurred approximately 1.3 miles downstream from the confluence of the Arroyo del Puerto and San Mateo Creek. (Exhibit EPA-18 at 3/Transcript 150-158, 161, 198-199, 259-263.) As the discharges have been substantially reduced, this new evidence will undoubtedly change these facts.

There does not now exist a continuous channel with or without water flow extending the San Mateo Creek to the Rio San Jose. Further, there was no evidence to establish that HMC's discharge reaches the

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*. Moreover, the Public Notice erroneously describes the Arroyo del Puerto and San Mateo Creek as a water of the United States classified for "recreation and support of desirable aquatic life presently common in New Mexico waters."

EPA's response to HMC's comment on this classification is irrelevant. EPA addressed the Rio Grande River as a water capable of sustaining aquatic life. The point is that HMC does not discharge into the Rio Grande but to the Arroyo del Puerto, which is not a water of the United States, does not connect with the Rio Grande, and does not contain water sufficient to sustain aquatic life, for the above reasons.

Rio San Jose or any discharge of any pollutant reaches the Rio San Jose. (Tr. at 263, 294-295) Even assuming arguendo a severe flood were to occur to carry water from the San Mateo Creek to the Rio San Jose, the amounts of constituents of concern to EPA would be so minute as to be totally undetectable. Moreover, the record did not support such a flood. The record showed that flooding severe

enough for water to flow over the unchannelled land between the San Mateo Creek and the Rio San Jose is extremely rare, if it ever occurs at all. (Ganus rebuttal testimony at 7, 9-10; Nylander Testimony at 5, 7/Tr. at 253, 265-268, 336, 344-348, 373-377, 400-401).

B. WHETHER THE CONDITIONS ADDED BY THE STATE CERTIFICATION ARE IN COMPLIANCE WITH SECTION 401 OF THE CLEAN WATER ACT, AS AMENDED.

The New Mexico certification represents the conditions the State required be added to the permit were necessary to:

> "...assure compliance with the applicable provisions of the Clean Water Act Sections 208(e), 301, 302, 303, 306 and 307 and with appropriate requirements of State Law."

The State's claim does not square with the facts nor the law; therefore, the conditions contained in New Mexico's certification were unlawfully added under Section 401 of the Clean Water Act and should be deleted. Because contested, the conditions added by certification should be stayed until final action occurs.

These conditions include:

1. Added to Part III(5) of the permit:

   Water Quality Standards for Interstate and Intrastate Streams in New Mexico: Part 1, Sections 1-102 F, General Standards, Hazardous Substances and 1-102 G, General Standards, Radioactivity.

2. Added to part 1, Section A - Effluent Limitations and Monitoring Requirements were the following effluent characteristics with limitations and monitoring requirements:

   Lead-210
   Polonium-210
   Barium
   Manganese

1. State Law

Section 401 requires that a certification shall set forth effluent limitations and monitoring requirements to assure the applicant will

comply with appropriate State law. The conditions were not necessary to comply with State Standards. First, the New Mexico Interstate and Intrastate Stream Standards do not apply because the Arroyo del Puerto and San Mateo Creek are neither interstate and intrastate streams. Clearly, neither of these streams is listed under Part 2 of those standards as streams to which particular standards apply. Secondly, the standards plainly state they apply to "all surface waters of the State which are suitable for recreation and support of desirable aquatic life presently common in New Mexico." Neither the Arroyo nor the Creek are suitable for such uses and do not support desirable aquatic life. The EPA Regional Administrator's findings do not contain any reference to aquatic life or recreation in the Arroyo del Puerto or San Mateo Creek or their suitability for such purposes. The findings do not even mention such uses after a thorough hearing on the characteristics and uses of the Arroyo and Creek. The reason is simple. Neither have the water to sustain such life. HMC's discharge is to an arroyo for which the sole sources of water are the discharges derived from the Kerr-McGee and Partnership underground mines and intermittent precipitation. Upstream from the Partnership facilities the arroyo is dry except in time of precipitation. It flows only in direct response to precipitation, and receives no water from springs and no long continued supply from melting snow or other surface sources. The same would be true of the entire arroyo in the absence of the Kerr-McGee and Partnership discharges (Exhibits AL-3.A, 3.B, 3.C, and EPA 18 at 2. Ganus testimony at 3, 4; Duggan testimony at 2/Transcript at 149-150). Approximately three miles down gradient from the Kerr-McGee discharge point the Arroyo del Puerto converges with San Mateo Creek. The evidence showed the entire flow of the San Mateo Creek is normally absorbed into the alluvium. Typically this occurs approximately 1.3 miles downstream from the confluence of the Arroyo del Puerto and San Mateo Creek. (Exhibit EPA-18 at 3/Transcript 150-158, 161, 198-199, 259-263.) As even less water is now discharged, constituting new evidence, even less water is at issue, making a nexus for these standards even more remote.

Indeed, the Arroyo and San Mateo Creek are not streams at all. A stream by definition must sustain water and must have a bed and banks. The lack of water is clear from the foregoing facts. Similarly, there does not now exist a continuous channel with or without water flow extending the San Mateo Creek to the Rio San Jose. (Exhibits EPA-31(a)(b) and Southwest 1/Transcript at 129, 224-Ganus Rebuttal Testimony at 5).

Even assuming arguendo the State interstate and intrastate standards apply, Section 1-102 G thereof would not require sampling under the NPDES permit to comply with Part 4 of the NMEIB regulations.

Measuring and analyzing as required in the permit for Lead-210, Polonium-210, Barium and Manganese will be unnecessary and inordinately time consuming and expensive for the insignificant concentrations involved. Polonium-210 has been dropped from the New Mexico

Environmental Improvement Division ("EID") Radiation Protection Bureau analytical list because nothing above extremely insignificant values has ever been observed. This same agency now through certification conditions would have HMC sample every 60 days for Polonium. Further, before Polonium-210 would begin to approach the limit set forth in Part 4 of the New Mexico Radiation Regulations, certain other radionuclides already analyzed would exceed their limits. Thus, excessive readings of other radionuclides, including Radium-226 and uranium, would be sufficient indicators of anything other than negligible Polonium-210 concentrations. Moreover, inasmuch as concentrations of these radionuclides are limited under the proposed NPDES discharge permit, the concentrations of Polonium-210 must necessarily be maintained at below concentrations set forth in Part 4 of the New Mexico Radiation Protection levels and thus the public health consistently would be protected.

Further, Lead-210, Barium and Manganese should not be measured, sampled and analyzed since less than detectable values of these constituents are all that have been observed. These are analyzed quarterly now under HMC's New Mexico radiation license. As less than detectable values are involved, there would be no reason to sample and to dramatically increase the cost and time involved. For example, for Lead-210 three weeks are involved before the results are obtained.

2. Federal Law

Compliance with the State interstate and intrastate stream standards is not necessary for the discharge to comply with Sections 208(e), 301, 302, 303, 306 and 307 of the Clean Water Act, and is not necessary for State certification.

Nor is effluent limitation and monitoring for Polonium-210, Barium, Manganese, and Lead-210 necessary to comply with the listed sections of the Clean Water Act, as amended. (Sections 208(e), 301, 302, 303, 306 and 307)

If these parameters were considered necessary for effluent limitation or water quality, they would already be included in the effluent limitations in EPA's Uranium, Radium and Vanadium Ores Subcategory. (40 CFR §440.32) They are not. Thus, they should be deleted from HMC's permit.

The State of New Mexico makes clear in its June 16, 1983 letter to EPA that "the attached certifications are conditioned on any evidence that may be presented at a public hearing if granted." Thus, even the State envisions its certification conditions conditional upon evidence presented at a hearing.

Finally, the State by letter of May 26, 1983, notified HMC it planned to impose conditions in HMC's NPDES permit. HMC by its June 15, 1983 comments notified the State it opposed such conditions, elaborating the reasons. The State, however, did not afford HMC a hearing on its proposed conditions and did not submit a statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements as required in 40 CFR §124.51. Thus, the State has violated Section 401 of the Clean Water Act, as amended, and its conditions for certification are void. Moreover, the State has waived its right to certify or object to any less stringent condition established through the EPA permit issuance process.

Section 307 simply is not applicable because toxic pollutants are not present in the discharge. As explained, HMC's quarterly sampling for the State demonstrates the negligible levels involved. To require superflous monitoring and analysis for the added constituents by the State constitutes arbitrary and capricious action.

HMC is a part of the depressed uranium mining industry which cannot afford such unjustified and unnecessary costs. More than 5,500 of the over 7,500 employees of the uranium industry in Northwest New Mexico are unemployed. Northwest New Mexico was the largest uranium producing area in the United States. Unjustified requirements such as the effluent limitations contained in the State's certification will only further depress an already beleagured industry and this discharger.

C. WHETHER THE pH LIMITATION INCLUDED IN THE PERMIT IS ARBITRARY AND CAPRICIOUS AND OTHERWISE NOT IN ACCORD WITH THE LAW.

HMC's NPDES permit, preceding the newly issued July 15, 1983 permit, contains a pH limitation between 6.0 and 9.0, which is the range allowed under EPA's effluent limitation guidelines. 40 CFR §440.52 EPA has inserted a limitation in the newly issued permit of pH between 6.6 and 8.6, stating this is a State requirement. While the present state standard for pH is listed between 6.6 and 8.6, another state regulation makes clear that this standard does not apply to any discharge subject to a NPDES permit. (See Section 2-100 of the New Mexico Water Quality Control Commission Regulations.) New Mexico informs us it will propose a change in the near future in its present pH standard to 6 to 9. New Mexico does not in its certification propose a pH standard of 6.6 to 8.6. EPA arbitrarily has taken upon itself to insert this limitation, which is contrary to New Mexico's applicable regulation for NPDES permits and is arbitrary, capricious and not in accord with EPA's or the State's law. This provision should be stayed until final agency action occurs.

D. WHETHER THE PERMIT MUST HAVE INCORPORATED THE SETTLEMENT AGREEMENT CHANGES TO APPLICABLE REGULATIONS.

The proposed NPDES permit should have incorporated the proposed changes in Part 122, 124 and 125 of the consolidated permit regulations, pursuant to the settlement agreement entered into by EPA and industry petitioners in the consolidated permit regulations litigation (NRDC v. EPA and consolidated cases No. 80-1607 [D.C. Cir. filed June 2, 1980]. These changes are described by EPA as "reducing the regulatory burdens imposed on permittees" 47 Fed. Reg. p. 52072. Nov. 18, 1982. There are a number of issues settled in the agreement which are not reflected in the proposed permit. At a minimum, Part II, Standard Conditions for NPDES Permits should have been amended to include in Section A, a new paragraph which would provide for modification of the permit in conformance with final rules under the settlement.

All of the discharge limitations in Part 1 A should be designed as net limitations in conformance with the proposed changes in Section 122.63(h) of the rules.

Part II, Section B.3, Bypass of Treatment Facilities, of the permit should have been modified to reflect the proposed changes in Section 122.60(g) of the rules which would eliminate the restriction prohibiting bypass except where necessary for essential maintenance purposes, so long as such bypass would not cause a violation of the permit effluent limitations or other permit conditions. This change also revises the current rules to make it clear that installation of backup equipment is not necessary unless otherwise called for.

Part II, Section B.4, Upset Conditions, of the permit should have been modified to reflect the proposed changes in Section 122.60(h) of the rules consistent with court rulings on this subject.

Part II, Section D-11, Signatory Requirements, of the permit should have been modified to reflect the proposed changes in Section 1222.6(b)(2) of the rules to allow an individual or position having overall responsibility for environmental matters for the company to sign all applications, reports or information submitted to EPA.

HMC believes that the above sets forth ample grounds upon which an adjudicatory hearing should be granted. The issues set forth above, in HMC's opinion, raise mixed questions of fact and law and include factual, scientific and economic issues which can only be resolved by an adjudicatory hearing. It is HMC's understanding that pending final agency action every provision of the permit is stayed.

Respectfully submitted,

HOMESTAKE MINING COMPANY

STEPHENSON, CARPENTER,
CROUT & OLMSTED

By _____

Attorneys for
Homestake Mining Company

cc: Charles Nylander (NMEID)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VI

IN THE MATTER OF

NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM PERMIT FOR

UNITED NUCLEAR-HOMESTAKE
PARTNERS
GRANTS, NEW MEXICO

NPDES PERMIT NO. NM 0020389

STIPULATION AND AGREEMENT

The permittee hereinabove named, the United States Environmental Protection ~~Agency~~ Division (EPA), Region VI (EPA), the New Mexico Environmental Improvement Agency, Southwest Research and Information Center, and Ms. Sandra Simons stipulate and agree as follows in regard to the above referenced administrative action:

I. The permittee hereby stipulates its adjudicatory hearing shall be as provided herein.

II. The following issue, raised by the permittee in its Adjudicatory Hearing Request of June 4, 1976, remains unresolved:

"Whether the EPA has NPDES Discharge permit jurisdiction pursuant to the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500." It is the permittee's contention, disputed by the other parties to this proceeding, that its discharge is not a discharge into "navigable waters" and that its discharge does not move into "navigable waters" as defined in Section 502(7) of the FWPCA, as amended, or is otherwise within the permit jurisdiction of EPA.

III. The parties hereby agree to submit the following documents to the Regional Administrator of Region VI as the sole record for use by the Regional Administrator in issuing an initial decision as described in 40 CFR 125.36(1), with regard to the unresolved issue described in paragraph II:

1. The Hearing Record developed on the same issue (whether the permittee's discharge moves into "navigable waters" as defined in Section 502(7) of the FWPCA, as amended,) in the adjudicatory hearing involving Kerr-McGee Nuclear Corporation, (NPDES Permit No. NM 0020532) scheduled to begin on July 11, 1978, before the Honorable Thomas B. Yost;

2. A Supplementary Stipulation of Fact pertaining to factors unique to the situation of United Nuclear-Homestake Partners NPDES Permit No. NM 0020389. This Supplementary Stipulation of Fact is attached hereto as Attachment A; and

3. Proposed findings and conclusions (as described in 40 CFR 125.36(k),) submitted by any party to this proceeding concerning the unresolved issue described in paragraph II.

IV. The initial decision of the Regional Administrator may be appealed in the manner described in 40 CFR 125.36(n).

UNITED NUCLEAR-HOMESTAKE PARTNERS

By: Stanley J. Wilson
Title: Attorney for United Nuclear
Date: June 14, 1978

New Mexico Environmental Improvement ~~Agency~~ Division (NMED)

By: Bruce D. Gaboury
Title: Division Attorney
Date: June 14, 1978

Southwest Research and Information Center

By: Dennis D. Hunt
Title: attorney
Date: June 14, 1978

New Mexico Public Interest Research Group

By: Dennis D. Hunt
Title: attorney
Date: June 14, 1978

Ms. Sandra Simons

By: Dennis D. Hunt
Title: attorney
Date: June 14, 1978

United States Environmental Protection Agency

By: James D. Bunting
James D. Bunting
Attorney for Region VI
Environmental Protection
Agency

Date: June 14, 1978

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VI

Attachment "A"

IN THE MATTER OF	)	
	)	
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT FOR	)	
	)	STIPULATION OF FACTS
UNITED NUCLEAR-HOMESTAKE PARTNERS	)	
GRANTS, NEW MEXICO	)	
	)	
NPDES PERMIT NO. NM 0020389	)	

STIPULATION

The permittee named above, the United States Environmental Protection Agency. Region VI (EPA), the New Mexico Environmental Improvement Division, Southwest Research and Information Center, New Mexico Public Interest Research Group, and Ms. Sandra Simons stipulate and agree as follows:

The parties hereto for the purpose of obtaining a decision on the jurisdiction of the EPA over the discharge at issue in this proceeding, agree that the following facts and circumstances will be submitted to the decisionmaker (with each party free to raise any issue of materiality it deems appropriate), in addition to the hearing record on the same issue on the adjudicatory hearing concerning NPDES Permit No. NM 0020~~389~~ 532 (mjs) (Kerr-McGee Nuclear Corporation).

A. The parties

1. The permittee is United Nuclear-Homestake Partners (UN-HP).

2. UN-HP is a New Mexico limited partnership, whose only (NMSA) partners are United Nuclear Corporation and Homestake Mining Company.

3. United Nuclear Corporation is a Delaware corporation, qualified to do business in New Mexico.

4. United Nuclear Corporation engages in diversified nuclear fuel cycle operations, including mining and milling of uranium.

5. Homestake Mining Company is a corporation organized under the laws of California and qualified to do business in New Mexico, ~~and~~ It (NMSA) engages in the business of mining of minerals, including uranium, with operations in several states.

6. The principal activity of the permittee is mining and milling of uranium. UN-HP distributes yellowcake (U_3O_8) (NMSA) in kind to its respective partners at its mill located in Section 26, T.12N., R.10W., N.M.P.M. Valencia County, New Mexico.

7. The partners independently dispose of yellowcake to utilities or other customers outside of New Mexico. UN-HP has no mines or mills outside of New Mexico.

8. The permittee mines (yellowcake) uranium ore (ore) from four mines on Sections 15, 23 and 25, T.14N., R.10W., N.M.P.M. and Section 32, T.14N., R.9W., N.M.P.M., McKinley County, New Mexico. The permittee's mines are underground mines, and are several hundred feet deep.

9. Permittee produces the equivalent of approximately 330 pounds a day of yellowcake at the ion-exchange plant located on Section 25, T.14N., R.10W., N.M.P.M., McKinley County, New Mexico.

B. The Discharge's Characteristics

1. The discharge consists of an average of (936,000 gallons per day). Its frequency of flow is continuous.

2. Among the constituents of the discharge are Radium 226, uranium, molybdenum, selenium, and suspended solids.

3. The waste abatement technology employed is removal of some of the uranium, retention in a settling pond to remove suspended solids, and treatment by an interim barium chloride plant to experiment with the reduction of, and reduce, the radium levels.

4. UN-HP uses its ion exchange plant to extract uranium from the mine seepage and re-circulated waters pumped from the mines. Following processing

in the ion exchange plant, some of the water is discharged (936,000 gallons per day); the remainder (1,728,000 gallons per day) is re-circulated throughout the mines to leach further uranium and is then returned to the ion exchange plant.

5. The permittee does not withdraw water from the Arroyo Del Puerto. (NEW) ~~after discharge.~~

C. The location of the Discharge

1. Following its processing in the ion exchange plant some of the water processed is discharged to the Arroyo del Puerto.

2. The Arroyo del Puerto is a natural arroyo which receives precipitation run-off from the surrounding area.

3. Upstream from the ion exchange plant, the Arroyo del Puerto is a natural arroyo which flows occasionally in response to sufficient precipitation.

4. From the UN-HP ion exchange plant discharge point (NEW) The Arroyo del Puerto flows perennially due to the discharge for a short distance (approximately 1/2 mile) before the Kerr-McGee discharge is added to it (NPDES No. NM 0020532).

5. Sections 15, 23 and 25, T.14N., R.10W., N.M.P.M. and Section 32, T.14N., R.9W., N.M.P.M., McKinley County, New Mexico, are leased by UN-HP. Kerr-McGee owns Sections 24 and 26, T.14N., R.10W.,

N.M.P.M. and Section 31, T.14N., R.9W., N.M.P.M., (partly)
Valencia County, New Mexico. There is no fencing or other physical obstruction which would restrict access to the Arroyo del Puerto in these sections.

UNITED NUCLEAR-HOMESTAKE PARTNERS

By: Stanley J. Wilson
~~G. Stanley Crout~~
Bigbee, Stephenson, Carpenter & Crout
Attorneys for United Nuclear-Homestake Partners

Date: June 14, 1978

New Mexico Environmental Improvement ~~Agency~~ Division (MSD)

By: Bruce D. Gaber

Title: Division Attorney

Date: June 14, 1978

Southwest Research and Information Center

By: Dennis D. Hurt

Title: Attorney

Date: June 14, 1978

New Mexico Public Interest Research Group

By: Dennis D. Hurt

Title: Attorney

Date: June 14, 1978

Ms. Sandra Simons

By: Dennis D. Hurt

Title: Attorney

Date: June 14, 1978

United States Environmental Protection Agency

By: James D. Bunting
James D. Bunting
Attorney for Region VI
Environmental Protection Agency

Date: June 14, 1978.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VI

IN THE MATTER OF	)
	)
UNITED NUCLEAR-HOMESTAKE PARTNERS	)
	)
GRANTS, NEW MEXICO	)
	)
NPDES Permit NM-0020389	)

Peition for Review of Initial
Decision of the Regional Administrator

On March 11, 1981, the Regional Administrator issued an Initial Decision, attached as Appendix A, pursuant to 40 C.F.R. §125.36(1) (1978). Petitioner[1] hereby seeks review of that initial decision pursuant to 40 C.F.R. §125.36(7)(1), on the basis that:

A. The initial decision is based upon conclusions of law which are clearly erroneous;

B. The initial decision is based upon findings of fact which are clearly erroenous;

C. The initial decision involves an important matter of policy which the Administrator should review;

D. The initial decision is arbitrary and capricious, and not in accordance with law.[2]

1. By agreements dated March 31, 1981, United Nuclear-Homestake Partners, a New Mexico limited partnership, was dissolved, the assets becoming those of Homestake Mining Company, a California corporation.

2. Attached as Appendix B is a copy of Petitioner's Proposed Findings of Fact and Conclusions of Law and Appendix C is Petitioner's Brief and Reply Brief in Support of the Proposed Findings and Conclusions, all submitted as allowed by the applicable regulations to the Regional Hearing Clerk and to the Administrative Law Judge.

Petitioner's exceptions to the findings of fact and conclusions of law adopted by the Administrator, as well as to the failure to adopt certain of Petitioner's proposed findings of fact are set forth below. The errors in the factual findings adopted, as well as the Administrator's failure to adopt findings compelled by the record, contribute significantly to the erroneous application of law. The legal conclusions reached in this case are clearly erroneous and reflect a significant policy decision to expand EPA's jurisdiction beyond the confines established by Congress and reflected by the courts. Accordingly, the administrator should review the initial decision.

The initial decision involves an important matter of policy which the administrator should review because, among other things:

1. The decision is based on the erroneous concept that discharge to an ephemeral arroyo, normally dry above the point of discharge, which is not connected by a channel to a tributary of a navigable water and which discharge is only capable of reaching a navigable water in event of a aperiodic very large flood event, is a discharge to a tributary of a navigable water. The provisions of FWPCA, the court cases, and the EPA General Counsel opinions have required both a channel and a regular and periodic flow for such a discharge to be a discharge to a tributary of a navigable water. Further, the Tenth Amendment to the Constitution of the United States reserves to the States the exclusive power to regulate discharge in such circumstances.

2. The initial decision is erroneous in that it attempts to posit jurisdiction on subsurface absorption of the discharge into the ground, where it may flow as groundwater, and eventually, hundreds or thousands of years from now, emerge to the surface miles away and flow into a tributary of a navigable stream. Such reliance is erroneous because such a hypothesis is (a) too speculative (b) is not shown to be capable of transporting pollutants (c) is a matter reserved to the States under the Tenth Amendment and the FWPCA, and (d) is so remote in time as not to form a basis for jurisidction.

3. The initial decision is erroneous in that it relies on the former existence of what was once a channel connecting San Mateo Creek to the Rio San Jose in the past as a result of formerly more pluvial conditions in the Southwest's geological history.

4. The initial decision is erroneous in relying upon claimed interstate commerce, as the facts in this case show there was insufficient nexus with interstate commerce to confer Congress the authority to regulate the discharge under the Constitution. Further, Congress neither provided for, nor intended to, regulate a discharge where the claimed nexus with interstate commerce involves the facts in this case.

5. The jurisdiction to require an NPDES permit is limited to tributaries that are either perennial or intermittent, and does not extend to a discharge to an ephemeral bed, such as here involved.

6. The decision is further erroneous in that any episodic flood large enough to carry the discharge to a tributary of a navigable stream would be so large that there could be no identification of or existence of pollutants.

7. The decision is further erroneous in using speculation as to how in the future or by some aperiodic mechanisms the release of Petitioner, into surface or groundwater, could possibly effect interstate commerce.

A. The Discharge

Finding 2 -- This finding is erroneous to the extent it finds water is diverted to the milling facility. The stipulation provides groundwater is diverted to the ion exchange facility for removal of uranium. The milling facility is not mentioned in connection with the discharge in the stipulation.

Further the findings under A. (The Discharge) are lacking and misrepresentative to the extent they do not include the stipulated fact that Petitioner does not withdraw water from the Arroyo Del Puerto.

B. The Water

Findings B 1, 2, 3, 4 and 5 -- To the extent these findings positioned under the Subtitle "The Water" imply Arroyo del Puerto and San Mateo Creek contain flowing water in their natural states on more than an occasional basis and other than in direct response to precipitation they are erroneous. The evidence adduced and findings No. 2, 3, 5, 6 and 8 by Petitioner showed the channels of Arroyo del Puerto and San Mateo Creek are normally dry except in direct response to precipitation and in the absence of discharges receive no long continued supply from

surface sources. Further, the entire flow is normally absorbed into the alluvium. Moreover, the Initial Decision is erroneous in that it failed to adopt Petitioner's findings 2, 3, 4, 5, 6, 7 and 8 and discussion thereunder.

Finding B.1 is further erroneous because it is not supported in the referenced citation, Nylander, EPA 42. While the history of alluvial soil deposition in the San Mateo Valley in the geologic post is discussed, the Arroyo del Puerto's formation is not discussed except to assert that "Much of the water pumped from the mines is channeled into a formerly dry arroyo that carries the effluent southward out of the Ambrosia Lake area...."

Findings Nos. B 4 and 5 are erroneous to the extent they imply there exists a single channel in the San Mateo below Deadman's Curve or that the channel is of recent origin. The initial decision is erroneous in that it does not adopt Petitioner's findings 9 and discussion thereunder which shows that all witnesses agreed there is not a single channel through which water can flow down the San Mateo Creek to the Rio San Jose. Further, as shown by Finding No. 9, undisputed evidence was adduced the San Mateo channel which was continuous was a remnant of a much earlier time and has been largely inactive since then.

Finding No. B 6 is erroneous to the extent it provides that Petitioner has erected a tailings pile in the bed of the arroyo, obstructing it. The evidence shows merely that the Petitioner's tailings pile "serves to divert the channel flow in a more westerly direction" Nylander, EPA 42.

C. Flow

Finding 3 -- Contrary to the Administrator's finding, there is no evidence in the record to support the finding that in the absence of precipitation, Petitioner's discharge and discharges from other uranium mining facilities result in surface flow in San Mateo Creek. Though the Administrator purports to rely on Dr. Ganus' testimony, Dr. Ganus testified that normally all such surface flow is absorbed into the alluvium of the Creek. (Tr. 26) Moreover, as discussed below, EPA has produced no evidence showing that any discharge from Petitioner's discharge has ever resulted in surface flow in San Mateo Creek.

Finding C-4 is erroneous. Mr. Roundy testified that water which could reach the UN-HP mill would have to come from a heavy rain storm on Mount Taylor, not from discharge from mines. This water would not even contain discharge, as the Mount Taylor water would be at a lower elevation than the place where UN-HP water disappears into the ground.

There is no support in the record to support the finding that Petitioner's Ambrosia Lake discharge has ever been transported down San Mateo Creek, even as a result of precipitation. The Regional Administrator erroneously based his finding on the testimony of two local residents who testified regarding a 1972 flood that caused waters from San Mateo Creek to flow down from that Creek. (Carver; Roundy) Neither of these residents testified that the Petitioner's discharge was or could have been contained in that flow, and Mr. Roundy indicated the water was from a heavy rain on Mount Taylor, not in Ambrosia Lake. In

fact, the Administrator's finding that the Petitioner's discharge has been transported down San Mateo Creek was contradicted by EPA's own expert. Mr. Nylander admitted on cross-examination that he was not aware of anyone who had ever tested the San Mateo Creek area to establish whether any discharge from Petitioner's Ambrosia Lake facility was in fact reaching the Creek. (Tr. 263, 294-295).

In Finding C-5 the Administrator erroneously adopted the testimony of a resident who estimated that on the average of once every five years precipitation contributes enough water to the surface flow in San Mateo Creek that it reaches Rio San Jose. The resident, Mr. Carver, was able specifically to identify only one such event in the past 30 years. Since Mr. Carver's recollection that he had observed "five or six" floods in 30 years is contradicted by his own testimony, as well as the testimony of both Mr. Roundy and Dr. Ganus, it was error to enter Finding of Fact 5. (Tr. 9-10, 374-77, 401). Further, there was no evidence at all that the flow came from Ambrosia Lake, as opposed to Lobo Canyon or areas below (in elevation) the place where Petitioner's discharge disappears into the ground which receive flow from heavy rains on Mount Taylor. (Roundy, 375, 401)

Finding C-7 -- While groundwater originating from the absorption of San Mateo Creek into the ground can, over a very long period of time, reach Horace Springs, there was no testimony showing a mechanism by which a pollutant release by the Petitioner could reach Horace Springs in this manner.

Finding C.8

There was no showing that the Rio San Jose regularly flows into the Rio Puerco, or that the Rio Puerco regularly flows into the Rio Grande. Both the San Jose and the Rio Puerco are intermittent.

The findings of the Administrator concerning flow are further erroneous and misrepresentative in that they fail to adopt Petitioner's proposed findings 10 through 15 and the discussions thereunder.

D. Interstate Commerce

Finding D.2

The Regional Administrator erroneously concluded that some of Mr. Roundy's calves are auctioned in the interstate cattle market. The evidence in the record shows only that some of Mr. Roundy's cattle are auctioned by the Karler Packing Company in Albuquerque and that this company operates "regionally" (EPA Exhibits 30 and 32; Tr. 203-04). Since no evidence has been introduced to show that "regionally" means anything other than different regions in New Mexico, it was erroneous for the Administrator to conclude that any of Mr. Roundy's calves are auctioned in interstate commerce. Furthermore, the calves do not drink water from San Mateo Creek. The cows, but not the calves are seasonally along the Creek. (Roundy 380)

Finding D.3

Mr. Roundy does use spreader dams, but they are merely spreader dams; they are not diversions of surface flow in San Mateo Creek, and there was no evidence to support this portion of Fact D.3.

Fact D.4

This finding claims Mr. Roundy's cattle normally consume water derived from the alluvium underlying the creek (San Mateo), citing Tr. 380, Tr. 181-182. These transcript references do not so establish. Further, Mr. Roundy's calves are not even normally along the Creek. They come off Mount Taylor, and are cut over to fields in Bluewater. It is the calves that are sold (Roundy 380) (although not in interstate commerce).

The Administrator's Findings concerning commerce are further erroneous in that they did not adopt Petitioner's proposed finding 16.

II. CONCLUSIONS OF LAW

Petitioner takes exception to the Regional Administrator's Conclusion of Law that the Arroyo del Puerto is a "navigable water" under the 1972 Amendments to the Federal Water Pollution Control Act (FWPCA), that Arroyo del Puerto is a tributary to the Rio Grande, and that Arroyo del Puerto is tributary to San Mateo Creek, a stream affecting interstate commerce. Petitioner's exceptions to it are set forth above and below.

(A) The Regional Administrator erroneously concluded that a "navigable" water is one that may contribute surface flow to a navigable water in response to an extraordinary event that is proven to occur only on a rare occasion. (Initial Decision at 4).

In reaching this conclusion, the Administrator failed to recognize Congress' intention to confine EPA's jurisdiction to those waters with a regular or periodic continuity of flow into

waterways by an existing, not historical channel. This intention is made clear by the legislative history of the FWPCA, a long line of cases, as well as an EPA General Counsel opinion. Utah v. United States, 403 U.S. 9, 10-11 (1971); United States v. Ashland Oil and Trans. Co., 504 F.2d 1317 (6th Cir. 1974); Sierra Club v. Leslie Salt Co., 412 F.Supp. 1096 (N.D. Calif. 1976); United States v. Phelps Dodge, 391 F.Supp. 1181 (D. Ariz. 1975); United States v. Holland, 373 F. Supp. 665 (N.D. Fla. 1974); EPA General Counsel's Opinion No. 30, In Re: NPDES Permit for City of Ely, Neva., Spt. 18, 1975; S. Rep. No. 414, 92d Cong., 2d Sess. 3742-43 (1972). Furthermore, the episodic flood necessary for an aperiodic flow by surface flow from Petitioner's point of release to the Rio San Jose would be so immense as to render meaningless any so called pollutant in the Petitioner's release.

In reaching this conclusion, the Administrator failed to recognize that Congress intended that regulation of subsurface waters be left exclusively to the states and that EPA's role be limited to study. See, e.g., Exxon v. Train, 556 F.2d 822 (7th Cir. 1977). Further this is a matter reserved to the States under the Tenth Amendment. The Administrator misinterpreted the General Counsel's opinion in Re City of Phoenix, Arizona, which considered only the authority of a state to regulate subsurface waters. (EPA General Counsel's Opinion No. 70, Aug. 9, 1978). The use of this opinion to support EPA's authority to regulate subsurface flow is clearly erroneous.

In any event, the facts supporting a subsurface connection in this case show that such a connection will take between 500 and 1,000 years (Initial Decision, Finding (C)(7); Nylander Testimony 17-21; Ganus Rebuttal Testimony 12-14; Tr. 88-109; 373-77). Obviously, this speculative connection is not grounds to expand EPA's jurisdiction beyond the confines established by Congress, nor could EPA do so even if it believed that the facts warranted such expansion. Further, no mechanism was shown that would carry a pollutant from Petitioner's release to navigable water in this manner

(C) The Administrator erroneously concluded that San Mateo Creek and its underlying alluvium are waters in which there is some "public interest" because their pollution could affect interstate commerce.

To hinge EPA's jurisdiction on any effect Mr. Roundy's cattle may have on interstate commerce is highly tenuous and inappropriate in view of the facts. First, there was no showing his calves shipped to Karler Packing plant in Albuquerque or Belen, New Mexico, either drank from San Mateo Creek or ate grass irrigated by waters from San Mateo Creek. Nor, assuming arguendo only, they drink from San Mateo Creek, there was no showing Petitioner's discharge was present or was imbibed by the cattle. Secondly, there was no showing calves shipped by Mr. Roundy to the Karler plant were shipped interstate, but only regionally, which was not shown to be outside the regions of New Mexico. Moreover, Roundy sold his calves in New Mexico to a New Mexico buyer. This cannot constitute interstate commerce.

Finally, a mere assertion in the initial decision that "it is most probable Mr. Roundy uses these wells to water his cattle" is not sufficient connection to show that Petitioner's discharge is capable of affecting interstate commerce. This statement is entirely speculative juxtaposed to a statement that a number of wells tap the alluvium on Mr. Roundy's ranch.

As previously noted, Congress did not intend to extend EPA's jurisdiction beyond discharges into waterways having a nexus with a navigable in-fact waterway. Moreover, as noted earlier, the facts do not support a finding that the pollution of San Mateo Creek either does or could affect interstate commerce. The Administrator's highly speculative conclusion that in the future there is the remote possibility that such pollution could affect interstate commerce is, in the view of EPA, not sufficient to invoke its jurisdiction under the FWPCA. E.g., NPDES Permit for City of Ely, Nev., supra.

Petitioner takes exception to the Administrator's failure to adopt its proposed conclusions of law and states the Administrator's conclusions are clearly erroneous.

WHEREFORE, Petitioner respectfully requests that the Initial Decision of the Regional Administrator be reviewed and that the proposed Findings of Fact and Conclusions of Law of Petitioner be adopted by the EPA.

Respectfully submitted,

BIGBEE, STEPHENSON, CARPENTER,
CROUT & OLMSTED

By G. Stanley Crout by SJN
G. Stanley Crout

By Sunny J. Nixon
Sunny J. Nixon

CERTIFICATE OF SERVICE

I hereby certify that I caused an original and two copies of the foregoing Petition for Review in the Matter of UN-HP NPDES Permit NM-0020389 to be hand delivered to the Administrator, Environmental Protection Agency, 401 M Street, SW, Washington, D.C. 20460, this 14th day of April, 1981, and that I caused a copy of the foregoing Petition for Review to be mailed from Santa Fe, New Mexico, this 14th day of April, 1981 to each of the following:

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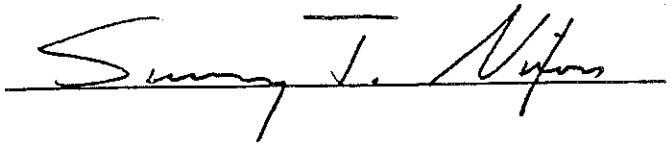

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:

UNITED NUCLEAR-HOMESTAKE PARTNERS
Grants, New Mexico

NPDES Permit No. NM-0020389

Marvin E. Jones
Administrative Law Judge
1738 Baltimore
Kansas City, Missouri 64108

BRIEF IN SUPPORT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF UNITED NUCLEAR-HOMESTAKE PARTNERS NM-0020389

Pursuant to the order of Marvin E. Jones, Administrative Law Judge, entered November 22, 1978, United Nuclear-Homestake Partners ("the Partnership") submits this brief in support of its proposed findings of fact and conclusions of law with respect to its ion exchange facility on Section 25, T.14N., R.10W., N.M.P.M., McKinley County, New Mexico.

I. ISSUE PRESENTED

By stipulation and agreement dated June 14, 1978 between the parties, the issue presented is whether the discharge of United Nuclear-Homestake Partners is a discharge into navigable waters and whether its discharge moves into navigable waters as defined in Section 502(7) of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500 (FWPCA).

An NPDES permit must be obtained by the Partnership only if its ion exchange plant is discharging pollutants into "navigable

waters" as defined in Section 502(7) of the FWPCA. The Environmental Protection Agency (EPA) maintains that the statutory requirement is met under any of the following theories:

1. Discharge from the Partnership might be carried during periods of extreme flooding into the Rio San Jose.

2. Discharge from the Partnership is absorbed into alluvium and forms part of groundwater, and in a period in excess of 100 years, will in part eventually reach Horace Springs and Horace Springs flows into the Rio San Jose.

3. The discharge from the Partnership absorbed into the alluvium will form part of the groundwater and the groundwater may eventually be removed by wells in Milan and Grants, New Mexico and used by hotels and restaurants there to serve interstate travellers.

4. That cattle drink from San Mateo Creek and may be sold to interstate commerce.

In response to EPA's theories the Partnership contends:

1. Its discharge of underground mine seepage water could enter the Rio San Jose only in event of a flood of extraordinary proportions.

2. In any event it would be most probably absorbed into groundwater long before reaching the Rio San Jose.

3. It would not reach the Rio San Jose through any channel or tributary system.

4. A flood of such extraordinary proportions would not occur within the time duration of NPDES permits.

5. As to ground water reaching Horace Springs or Grants and Milan:

a. A requirement to obtain an NPDES permit cannot

be based upon discharge to groundwater which will not reach such areas for many years;

b. EPA has no authority under the FWPCA to regulate groundwater; and

c. In any event it is not shown that any pollutant would travel to Horace Springs or Grants and Milan under any circumstances underground.

6. As to the contention concerning cattle, the Partnership contends:

a. It was not shown that cattle drinking discharge from the Partnership actually wind up in interstate commerce;

b. It was not shown that the water the cattle drink was from the Partnership discharge; and

c. There was no evidence that cattle which drank from the San Mateo Creek did so as part of utilization for industrial purposes by industries in interstate commerce.

7. The Partnership also contends as to underground waters, that a discharge such as the Partnership's to underground waters in vast underground aquifers with generalized disbursal without discreet channels cannot form the basis for the requirement of a NPDES point source permit.

II. DISCUSSION

The discussion will be presented in the order of the four contentions EPA makes for establishing jurisdiction to require an NPDES permit for the Partnership.

Point 1. The claim that severe flooding could move Partnership discharge into the Rio San Jose does not meet the requirement that the discharge be to a navigable waterway.

EPA's first claim is that the Partnership's discharge into the Arroyo del Puerto, which itself is dry except in response to direct percipitation upstream from the point of discharge, could eventually move to the Rio San Jose, albeit not in a continuous channel, in periods of severe flooding.

No evidence was presented to show that such an event regularly occurs, or is even likely to occur during the life of an NPDES permit.

A permit for the "discharge of a pollutant by any person" is required under Section 301 of FWPCA. Discharge of pollutant is defined in Section 502(12), 33 U.S.C. Section 1362(12) as "(a) any addition of any pollutant to navigable waters from any point source." "Navigable waters" is in term defined as:

> "The waters of the United States, including the territorial seas." Section 502(7) 33 U.S.C. Section 1352(7).

In addition to the statutory definition the EPA has adopted regulations further defining the phrase navigable waters. The definition is found in 40 C.F.R. Section 125.1(p) which provides:

> "(1) All navigable waters of the United States;
> (2) Tributaries of navigable waters of the United States;
> (3) Interstate waters;
> (4) Intrastate lakes, rivers and streams which are utilized by interstate travelers for recreational or other purposes;
> (5) Intrastate lakes, rivers and streams from which fish or shellfish are taken and sold in interstate commerce; and
> (6) Intrastate lakes, rivers and streams which are utilized for industrialized purposes by industries in interstate commerce."
>
> These definitions are inclusive.

The term "navigable waters" had long been the subject of dispute as to federal jurisdiction under the commerce clause of the Constitution. Shortly before the 1972 amendments to FWPCA, the Supreme Court in Utah v. United States, 402 U.S. 9 (1971), eliminated the requirement that a waterway be used for interstate or foreign commerce and required only that it be used as a highway of commerce. The Rivers and Harbors Act of 1899, 33 U.S.C. Section 407 (1970), and Section 13 had required a permit for the deposit of refuge in or on the bank of a navigable waterway. The use of navigability constituted a limitation on pollution control by the Army Corps of Engineers in that navigability did not include the concept of small feeder streams or wetlands, which flowed into streams that were navigable. The bill originally passed by the House of Representatives would have confined EPA's jurisdiction to the navigable waters of the United States (H.R. 11869, 1 Legislative History 1069).

When the historical development and disputes concerning navigability are considered, it is not surprising that the bill as finally passed equates "navigable waters" in Section 502(12) with "waters of the United States" in Section 502(7). The Committee of Conferences joint explanatory statement shows:

> "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unincumbered by agency determinations which have been made or may be made for administrative purposes." 1 Legislative History 327.

The congressional intention to avoid the small feeder stream and wetlands limitations of the Rivers and Harbors Act and similar historical developments concerning navigability are shown in the remarks of Congressman Dingle when he referred to the new definition of Section 402(7): "Encompasses all water bodys, including main-streams and their tributaries, for water quality purposes. No longer are old narrow definitions of navigability as determined by the Corps of Engineers going to govern matters covered by this bill." Legislative History, Volume 1, page 250.

It is fair to say then that the 1972 amendments to FWPCA were intended to control pollution to navigable streams by including pollution control of the tributaries and wetlands feeding them.

The legislative intent of FWPCA outlined above is supported by United States v. Ashland Oil and Transportation Co., 504 F.2d 1317, (6th Cir. 1974). In that case the discharge was to Little Cyprus Creek which was a flowing creek. Little Cyprus Creek regularly flows into Cyprus Creek, which was a regularly flowing tributary to Pond River and Pond River was a regularly flowing tributary to Green River which was navigable in fact. The contention was made by the discharger that tributaries of tributaries of navigable streams were not included within the definition of navigable waters as used in FWPCA. The court held otherwise, noting that otherwise the tributaries which joined to form the river could then be used as open sewers as far as federal regulation was concerned and the navigable part of the river could be a mere conduit for upstream waste.

Ashland Oil, supra, does not deal with the problem here presented where the evidence clearly shows that the discharge from the Partnership, even when combined with the discharge from Kerr-McGee, does not ordinarily or regularly (and perhaps never) reaches the Rio San Jose.

A number of cases have decided that an NPDES permit may be required when the discharge will on a "regular" or "periodic" basis flow into navigable waters. For example, in United States v. Phelps Dodge, 291 F.Supp. 1181 (D.C. Ariz., 1974) the Court noted that when waters from a normally dry arroyo ultimately flowed into public waters a discharge was considered to be to navigable waters. This was because in the Phelps Dodge case water flowing in the arroyo in question might reasonably end up in a body of public water. The arroyo in Phelps Dodge apparently connected directly by its own channel. In U. S. v. Smith, 7 ERC 1937 (E.D. Va., 1975) the Court found that the defendant willfully placed dredged soil in marsh wetlands or caused such dredged soil to be washed into the marshlands, of Stutts Creek. The Court found that the "marshgrass salt meadow bay was periodically flooded under normal conditions" by salt water. The Court further found that the marsh wetlands were "regularly inundated by the tide" and "were periodically inundated by the tide." In reaching a conclusion of law, the Court noted that the placing of fill material on wet marshlands "regularly or periodically inundated" by tidal waters constituted discharge to waters of the United States in violation of FWPCA.

The Court also concluded that FWPCA extends beyond highwater mark to marsh wetlands which are "regularly or periodically inundated."

Another case emphasizing the requirement of "periodic" was United States v. Holland, 373 F.Supp. 665 (M.D. Fla. 1974). There a bayou normally separated from the sea was involved. It was "periodically" inundated by the tides.

The evidence in this case shows conclusively that there is no regular or periodic manner in which the discharge by United Nuclear-Homestake Partners into the Arroyo del Puerto can reach the Rio San Jose. The very most that could be said of the testimony of the EPA witnesses is that if a flood of sufficient magnitude occurred, waters from Arroyo del Puerto and the San Mateo Creek could overflow the unchanneled lands between San Mateo Creek and the Rio San Jose because the Rio San Jose is lower than the Arroyo del Puerto and San Mateo Creek areas. EPA's witness, Mr. Carver, could recall five or six floods over a thirty year period, but could identify only one, the flood of 1972. But whether these floods were in the Arroyo del Puerto-San Mateo area, or Lobo Creek, could not with certainty be established. Mr. Roundy, who had been in the area longer, testified that even in extreme flooding, the San Mateo Creek water is quickly absorbed into the porous soil of the area, and that water from San Mateo Creek had been as close as three miles to the Rio San Jose perhaps once or twice. No witness claimed that there presently exists a channel by which waters from San Mateo Creek could reach the Rio San Jose. Any conceivable channel that existed in the past, even without flow, would have been historic and any actual flow from the

San Mateo Creek area to the Rio San Jose may have been measured in geologic time.

Much of the evidence in this case dealt not with water flowing to the Rio San Jose but rather whether there were even damp areas on the ground, even that caused by rain in the area. (See for example Transcript 75-85)

The jurisdictional contentions of EPA attempt to expand "waters of the United States" beyond the intent of Congress. If a flood is big enough, under EPA contentions, NPDES permit jurisdiction would extend everywhere. The case law establishes that there must be some regular and periodic discharge into navigable waters before the FWPCA applies. For example, if the flood is big enough it could overflow settling ponds with no discharge at all located far from the banks of streams. Furthermore, the whole concept of controlling pollution of navigable waters loses its entire meaning in the context urged by EPA in this case. If there is a flood of the magnitude required, what could the Partnership, or for that matter, EPA do to regulate it or control it? There would be no discharge in the commonly accepted sense and the flood water would presumably be of such huge amounts that any pollution in the Partnership discharge would be in all likelihood more dilute than constituent levels in any water in which the flood eventually reached. Furthermore, could a flood conceivably fall within the point source NPDES permit system? See for example U. S. v. Earth Sciences Inc., 9 ERC 2137 (D.C. Colo. 1977). In the Earth Sciences case a mine ore leach pad was lined with a plastic film membrane. It was near a creek. In April, the ore sump leach pad

was covered with snow and ice. On a warm day the melting snow and ice filled the sump and leachate containing sodium cyanide and sodium hydroxide entered the flowing creek. The chemicals killed fish in the stream. The Court held that such a situation was not covered by "point source" provisions of the FWPCA. The evidence submitted would be more akin to a nonpoint source.

Further, general counsel for EPA has concluded that FWPCA does not apply when the discharge does not reach navigable waterways. Water of a perennial stream received discharge which was itself discharged into irrigation ditches. There was no connection between the stream and navigable water. EPA's general counsel ruled a discharge permit was not required. (EPA General Counsel Opinion in re: NPDES Permit for City of Ely, Nevada, September 18, 1975)

EPA General Counsel Opinion: in re City of Phoenix, August 9, 1978 is not to the contrary. In that matter two of the major rivers of the southwest, the Salt River and the Gila River, flow into Painted Rock Lake. The question was whether water quality standards for the State of Arizona required the application of the designated uses established for Painted Rock Lake to tributaries of Painted Rock Lake. Of course the Salt River has a direct channel and general counsel concluded that both surface and underground flow in the Salt River could be taken into consideration in determining whether, under Arizona state regulations under Section 303 of the Clean Water Act, the uses designated for Painted Rock Lake applied to the Salt River.

Since it was conclusively demonstrated in the evidence that there is no regular or periodic connection between discharge by

United Nuclear-Homestake Partners and the Rio San Jose, EPA is without authority to require an NPDES permit at the Partnership's ion exchange facility located on Section 25.

Point 2. NPDES Permits Are Not Required For Discharge That Disappears Into Subsurface Waters

The EPA's contention that the Partnership discharge, when absorbed into the soil of San Mateo Creek, will form part of the groundwater, and move in part in the general direction of Horace Springs and Milan and Grants, New Mexico through geologic formations cannot form the basis of a requirement for an NPDES permit.

Springs at Horace Springs do flow into the Rio San Jose and there are wells in the vicinity of Milan and Grants, New Mexico which tap groundwater.

The evidence in this case demonstrated that it will be decades or centuries before groundwater, travelling through diverse geologic formations covering extremely large areas, would travel from San Mateo Creek, where the Partnership discharge disappears, to either Horace Springs or Grants-Milan.

No evidence at all was introduced to show that any pollutants in any Partnership discharge would travel with the water underground and the EPA witnesses testified they had no evidence of such phenomenon. In Exxon Corporation v. Train, 554 F.2d 1310 (5th Cir. 1977), a deep well disposal case, EPA expressly disclaimed jurisdiction and authority to regulate subsurface disposal directly; but claimed that it could indirectly regulate deep well disposal where the disposal was both to surface navigable waters and to deep wells. This indirect regulation

could be accomplished through amendments to the existing NPDES permit regulating discharge to surface water. The Court rejected the contention of EPA. The Court noted:

> "Nonetheless, we think that a clear pattern of Congressional intent with respect to groundwaters emerges upon close examination of those sections of the Act that deal with the subject. That pattern is one of federal information gathering and encouragement of state efforts to control groundwater pollution -- but not of direct federal control over groundwater pollution."

The Exxon case calls attention to a specific amendment offered to the words "waters of the United States, including the territorial seas" in Section 502(7) of the FWPCA. The amendment which was offered, but which was not passed, clearly shows that the congressional intent was not to include groundwaters within the meaning of navigable waters or waters of the United States. The Court, in Exxon, noted in Footnote 17, in part, that:

> "The term 'navigable waters' is defined in §502(7) of the Act as 'the waters of the United States, including the territorial seas' An amendment was offered on the House floor that would have changed the Acts definition of 'discharge of a pollutant' to include 'any addition of any pollutant to groundwater from any point source.' 118 Congressional Record 10666 (1972) 1 Environmental Policy Division, Congressional Research Service, 93rd Congress, 1st Session, A Legislative History of The Water Pollution Control Act Amendments of 1972, 589 (Comm. Print 1973) (Hereinafter cited as Leg. Hist.). The amendment did not pass. See text at note 31 infra."

It is further noted that the EPA presented no evidence to show that any pollutant would actually travel through the underground geologic formations through which water passed and reemerge at Horace Springs.

Further, the time involved, which would be measured in centuries or many, many decades, would preclude considering the Partnership's discharge as one to "navigable waters."

Point 3. Cattle drinking water in San Mateo Creek do not give EPA jurisdiction.

There was no nexus established between cattle which may have drunk from San Mateo Creek and cattle which were sold commercially to the Karler Packing Company.

Although Dr. Nylander testified he had personally seen cattle on the Roundy ranch drink water in San Mateo Creek, he did not delineate whether the animals he observed drinking were cows or calves. Mr. Roundy, the owner of the cattle, explained he had a cow and calf operation. The calves only are sold and the calves are retained in the vicinity of the San Mateo Creek annually around the month of October.

Testimony suggested that some of the Roundy cattle were sold by the packing plant located in Albuquerque which operated regionally. However, "regionally" was never defined and there was no evidence that any of the carcasses were sold out of state.

EPA and the other parties likewise failed to demonstrate that water any Roundy cattle may have drunk was from the Partnership discharge.

Of particular significance was the failure to show that a few virtually unidentified cattle can be considered part of the utilization "for industrial purposes by industries and interstate commerce." Supra at p.4.

Furthermore, it defies logic to suggest that a few animals drinking water incidentally from an otherwise isolated water source could make that water navigable even if the animals were later sold in interstate commerce.

However, assuming such a theory has credence EPA has failed to show any cattle which may have consumed water from San Mateo Creek were sold in interstate commerce, or that the water was from Partnership discharge, or that the water was used by "any person."

Point 4. The Partnership Has Showed EPA Has No Jurisdiction

The Partnership has met whatever burden of proof is required of it for a showing that the EPA does not have jurisdiction over its discharge by establishing there is no discharge of a pollutant into waters and that its discharge does not reach navigable waters. Furthermore, the Partnership has proved that any subsurface, groundwater flow containing as a constituent the discharge from the Partnership is not the proper subject for an NPDES permit. Likewise, the Partnership has shown there is no relationship between the discharge and any sale of cattle in interstate commerce.

The Partnership has met both the burden of proof and the burden of going forward with the evidence. Although 40 C.F.R. 125.36(i)(1) provides in an adjudicatory hearing procedure "the burden of proof and of going forward with the evidence shall be upon the requester.", the courts have held in cases where the contested issue is the jurisdiction or authority of the administrative agency, "the Government should have -- and we conclude it does have -- the duty to establish a prima facie case..." Old Ben Coal Corp. v. Interim Bd. of Mine Operations Appeals, 523 F.2d 25, 39 (7th Cir. 1975). See also, U.S. v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied 419 U.S. 834 (1974). In the instant case the EPA and the other parties have failed to show it has jurisdiction and has filed to meet the prima facie case requirement.

To the contrary the Partnership has met both the burden of proof or persuasion and the burden of going forward with the evidence

by establishing the EPA does not have the jurisdiction to require an NPDES permit of the Partnership's discharge.

Respectfully submitted,

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In the Matter of

UNITED NUCLEAR-HOMESTAKE PARTNERS,
Grants, New Mexico

NPDES Permit No. NM-0020389

Marvin E. Jones
Administrative Law Judge
1738 Baltimore
Kansas City, Missouri

REPLY BRIEF OF
UNITED NUCLEAR-HOMESTAKE PARTNERS

United Nuclear-Homestake Partners ("the Partnership") submits this brief in reply to the Memorandum In Support of Proposed Findings and Conclusions submitted by the Environmental Protection Agency on December 18, 1978.

In its Memorandum, EPA contends a jurisdictional basis for an NPDES permit is established because (1) under a circumstance of severe flooding, the Partnership discharge may be carried into the San Jose; (2) cattle may drink water in San Mateo Creek, which may contain discharge from the Partnership, and the cattle may be sold in interstate commerce, (3) part of the Partnership "discharge" will enter groundwater and become a part of the groundwater; a portion of the general groundwater will enter the San Jose from springs in a period of time not less than 150 years; or (4) part of the Partnership "discharge" will enter groundwater, and over a long enough period of time, groundwater will reach wells in Grants and tourists may drink water from these wells.

The Partnership would suggest that neither the Acts of Congress nor the Regulations of the Environmental Protection Agency support the EPA's position that such random and speculative events afford a basis for issuance of an NPDES point source permit. The Partnership would refer to Maryland v. Wirtz, 392 U.S. 183 (1968), where the Supreme Court observed:

> "We uphold the enterprise concept on the explicit premise that an 'enterprise' is a set of operations whose activities in commerce would all be expected to be affected by the wages and hours of any group of employees, which is what Congress obviously intended. So defined, the term is quite cognizant of limitations on the commerce power. Neither here nor in Wickard has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence."

When the statute enacted by Congress, the regulations of the EPA and the case law decided under them are applied to the facts of this case, it will be seen that the random and remote possibility involved in this case is not appropriate for regulation by an NPDES permit.

1) Flood Possibility. The testimony most favorable to the EPA's position was to the effect that flooding that could reach from the Partnership's operations to the San Jose was exceedingly infrequent and verged upon the catastrophic. Where rain, not a person, causes the carriage of otherwise controllable pollutants into a navigable waterway, the person responsible for the pollutant

is not held responsible. Sierra Club v. Abston Construction Co., 10 ERC 1416 (D.C.Ala. 1977) The testimony most favorable to EPA establisehd that there was no continuous channel by which the Partnership's discharge could reach the Arroyo del Puerto, and the evidence showed without question that there is neither regular nor periodic methods by which pollutants could be carried to the Rio San Jose. The cases thus far decided have without exception required both a means by which a discharge could reach navigable in fact waters and a periodic occurrence of the discharge reaching navigable waters. See: United States v. Texas Pipeline Company, 11 ERC 1465; United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir. 1974); United States v. Phelps-Dodge, 291 F. Supp. 1181 (D.C. Ariz. 1974); United States v. Smith, 7 ERC 1937 (E.D.Va. 1975); United States v. Holland, 373 F.Supp. 665 (N.D.Fla. 1974).

The EPA's expert witness, Duggan, testified there is not now a single channel from the San Mateo Creek to the Rio San Jose (Tr. 152-153), and EPA's witness Nylander testified that there is now no continuous, discernible channel (Tr. 2390240).

One must be careful to distinguish between the Arroyo del Puerto, which is not continuous with the San Mateo Creek and the Rio San Jose, and the Rio Puerco which is at times a flowing stream but is an entirely different stream from the one to which the Partnership discharges, the names only being similar. (For area of confusion, see Nylander, EPA Ex. 42, pages 11-16.)

Thus, the discharge by United Nuclear-Homestake Partners

into the Arroyo del Puerto does not fall within the definitions of the waters of the United States set forth by EPA in 40 C.F.R. §125.1(p), providing that navigable waters includes tributaries of navigable waters of the United States since there is no channel by which the Arroyo del Puerto reaches the Rio San Jose.

2. The Cattle Claim. The most incidental nexus between cattle which may drink from water in the San Mateo Creek (which may contain a discharge from the Partnership's mine) and a packing company which reportedly sold cattle to customers (which conceivably could include out-of-state customers) is not the substantial relation to commerce anticipated in FWPCA, as amended. Rather, it is merely de minimis contact. See Maryland v. Wirtz, supra. To suggest that the San Mateo Creek was utilized by the Karler Packing Company as an industry in interstate commerce presupposes that a regular connection lies between the two. Such a connection could be established only in the event the Roundy ranch regularly employed the Partnership's discharge to raise cattle sold to the Karler Packing Company, and in the event these cattle were eventually sold in interstate commerce by the Karler Packing Company. Rather, the evidence adduced did not establish such a regular connection, if it established a connection at all. Mr. Roundy testified that only his calves were sold, not his cows, and the few calves would have been in the San Mateo Creek area only for a short time around October. There was no testimony though that the calves actually sold drank from the San Mateo Creek. Possibilities of interstate transport of

meat purchased at Mr. Roundy's meat market are even more remote, since Mr. Roundy testified that anyone purchasing meat at his meat market and transporting that meat out of New Mexico would have to do so illegally. Even more remote in time and location were certain cattle owned by Mr. Roundy which were shipped to Colorado. It was never established from which water these cattle drank or when they drank water.

Such unestablished, and at most infrequent, connections do not comprise the contact necessary for interstate commerce. Moreover, such obscure, if not improbable, connections were not within the purview of the FWPCA. The EPA's own regulations define navigable waters which are not actually navigable in fact or tributaries thereof as including only those additional intrastate waters utilized by interstate travelers for recreation, intrastate waters from which shellfish and fish are taken and sold in interstate commerce, and intrastate streams utilized for industrial purposes by industries in interstate commerce. (See 40 C.F.R. §125.1(p)) Since no evidence showed this "intrastate" water was used for recreation or fishing, any jurisdiction must at most be based upon a classification of an occasional calf drinking water in the creek as an "industrial purpose." This is at odds with the facts in this case.

3. Claim that Some Groundwater Will Eventually Reach Horace Springs. - The claim that some of the Partnership discharge will eventually reach Horace Springs, and that Horace Springs water

will run into the San Jose, does not provide a jurisdictional basis for the following reasons:

(a) Congress rejected an amendment to Section 502(7) of the FWPCA which would have regulated "any addition of any pollutant to groundwater from any point source." See legislative history discussed in Exxon Corporation v. Train, 554 F.2d 1310 (5th Cir. 1977), footnote 17.

(b) No evidence was introduced showing a pollutant would travel underground from the Partnership to Horace Springs.

(c) The time involved is so remote as to preclude the appropriateness of an NPDES permit.

(d) There was a clear showing that the generalized groundwater flow under thousands of square miles could not be a "conduit" as required by the FWPCA.

(e) The opinions of EPA General Counsel in City of Phoenix and Town of Buckeye are not of assistance to EPA's position, as they involve portions of the navigable in fact river (Salt and Gila) which temporarily go underground in the channel, and do not involve a discharge to generalized unchanneled groundwater.

4. Grants Wells - The theory that groundwater would eventually reach wells in Grants, and some interstate traveler may at some time drink water from such a well is even more speculative than the Horace Springs argument. All the defects to jurisdiction mentioned in connection with Horace Springs are present, plus the additional defect that under EPA's own regulations, such interstate

water could not be used either for recreation or fishing.

5. Conclusion - The factual situation here involved would require a catastrophic event before the discharge of pollutants by the Partnership could reach the San Jose. One can imagine almost any discharge being swept up in a flood and, through a chain of circumstances, moved to a navigable stream. One could imagine almost any water being occasionally used by wildlife and livestock. However, the whole purpose of the FWPCA is to regulate those discharges which may reasonably be expected to reach navigable streams on a regular or periodic basis by technological standards. The random events postulated by EPA for a jurisdictional basis here are not consistent with the act.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify a copy of the foregoing brief was mailed, postage paid, to counsel below listed this 22nd of January, 1979.

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:

UNITED NUCLEAR-HOMESTAKE PARTNERS
Grants, New Mexico

NPDES Permit No. NM-0020389

Marvin E. Jones
Administrative Law Judge
1735 Baltimore
Kansas City, MO 64108

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF
UNITED NUCLEAR-HOMESTAKE PARTNERS
NM-0020389

Pursuant to the order of Marvin E. Jones, Administrative Law Judge, entered November 22, 1978, United Nuclear-Homestake Partners ("the Partnership") submits the following findings of fact and conclusions of law.

I. INTRODUCTION

The United States Environmental Protection Agency, Region VI (EPA), the New Mexico Environmental Improvement Division (EID), Southwest Research and Information Center (SRIC), New Mexico Public Interest Research Group (NMPRIG), and Ms. Sandra Simons (Simons) and the Partnership provided by Stipulation and Agreement dated June 14, 1978, that the following issue raised by the permittee in its adjudicatory hearing request of June 4, 1976 remains unresolved:

> "'Whether the EPA has NPDES discharge permit jurisdiction pursuant to the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500.' It is the permittee's

contention, disputed by the other parties to this proceeding, that its discharge is not a discharge into 'navigable waters' and that its discharge does not move into 'navigable waters' as defined in Section 502(7) of the FWPCA, as amended, or is otherwise within the permit jurisdiction of EPA."

The parties agreed to submit to the Regional Administrator of Region VI as the sole record for use by the Regional Administrator in issuing an initial decision as described in 40 CFR 125.36(1), with regard to the unresolved issues described above, the hearing record developed in the adjudicatory hearing involving Kerr-McGee Nuclear Corporation, (NPDES Permit No. NM-0020532) scheduled to begin on July 11, 1978, before the Honorable Thomas B. Yost, Administrative Judge, relating to the Kerr-McGee Nuclear Corporation ("Kerr-McGee") Ambrosia Lake Discharge and a supplementary stipulation of facts pertaining to factors unique to the Partnership.

A Stipulation of facts unique to the Partnership was entered by the parties on June 14, 1978. The Stipulation specifically allows any party to raise any issue of materiality as to any part of this Stipulation.

II. SUMMARY OF CONTENTIONS

The Partnership contests the authority of EPA to issue an NPDES Permit to the Partnership's ion exchange facility located on Section 25, T.14N, R10W., N.M.P.M., McKinley County, New Mexico under the FWPCA as amended. It is the contention of the Partnership that its discharge of seepage water in its underground mines, which are several hundred

feet deep, into the Arroyo Del Puerto, which is normally dry, but which occasionally has water in it in response to sufficient precipitation, does not constitute a discharge into navigable waters as defined in Section 502(7) of the FWPCA as amended. Further, after the underground mine seepage water is discharged into the Arroyo Del Puerto, it is the contention of the Partnership that the water so discharged does not move into "navigable waters" as defined in Section 502(7) of the FWPCA as amended. Any discharge water from the Partnership, together with any precipitation run-off and Kerr-McGee discharge, does not flow more than a few miles downstream, and it could only enter the Rio San Jose under conditions of extreme flooding, and even in that event, it would not enter the Rio San Jose through a tributary or channel network.

EPA contends that the Partnership's discharge could be carried to the Rio San Jose if a large enough flood occurred. EPA also contends that the Partnership discharge enters groundwater and a portion of the discharge would, within a period of time of approximately 150 years, feed Horace Springs which flows into the Rio San Jose. EPA also contends that discharge from the Partnership enters groundwater, a portion of which might eventually be removed by wells in Milan and Grants, New Mexico and be used by hotels and restaurants that may serve interstate travelers. The EPA also contends that cattle drink water from San Mateo Creek and cattle are sold and might enter interstate commerce.

In response to the contentions of EPA, the Partnership contends (i) its discharge of underground mine seepage water could enter the Rio San Jose only in event of a flood of extraordinary proportions;

(ii) in any event it would be more likely absorbed into groundwater long before reaching the Rio San Jose; (iii) it would not reach the Rio San Jose through any channel or tributary system and (iv) a flood of such extraordinary proportions were shown by the evidence not to occur within the time duration of NPDES permits.

A requirement to obtain an NPDES permit cannot be based upon discharge to groundwater which will not reach Horace Springs for centuries. In any event, it is not shown that any pollutant in the Partnership discharge would travel to Horace Springs under any circumstances underground.

As to the contention of EPA that underground wells in the Grants-Milan area may eventually intercept Partnership discharge, the Partnership submits, (i) such discharge cannot under the testimony reach any such wells within the time limit of the permit; (ii) jurisdiction cannot be based upon underground waters; and (iii) that in any event no pollutant was shown by the testimony as likely to travel with underground water to reach the wells.

As to the contention that cattle drink water from San Mateo Creek it was not shown that such cattle actually wind up in interstate commerce, it was not shown that the water they drink was from the Partnership discharge, and there was no evidence that cattle which drank from San Mateo Creek did so as part of utilization for industrial purposes by industries in interstate commerce. Even if the cattle did drink water from Partnership discharge it would not turn the Partnership discharge into a discharge into navigable waters within the meaning of the FWPCA.

The Partnership also submits that under the EPA's theory of discharge at Horace Springs or Grants-Milan wells, such a discharge cannot justify an NPDES point source discharge at the location of the Partnership's ion exchange plant many, many miles away with generalized dispersal to vast underground aquifers without any discreet channel having been established by the evidence.

III. STIPULATED FACTS

The following are the Stipulated Facts which the Partnership contends are material:

A. The parties

1. The permittee is United Nuclear-Homestake Partners (UN-HP).

B. The Discharge's Characteristics

1. The discharge consists of an average of 936,000 gallons per day. Its frequency of flow is continuous.

2. Among the constituents of the discharge are Radium 226, uranium, molybdenum, selenium, and suspended solids.

3. UN-HP uses its ion exchange plant to extract uranium from the mine seepage and re-circulated waters pumped from the mines. Following processing in the ion exchange plant, some of the water is discharged (963,000 gallons per day); the remainder (1,728,000 gallons per day) is re-circulated throughout the mines to leach further uranium and is then returned to the ion exchange plant.

4. The permittee does not withdraw water from the Arroyo Del Puerto.

C. The Location of the Discharge

1. Following its processing in the ion exchange plant some of the water processed is discharged to the Arroyo Del Puerto.

2. The Arroyo Del Puerto is a natural arroyo which receives precipitation run-off from the surrounding area.

3. Upstream from the ion exchange plant, the Arroyo Del Puerto is a natural arroyo which flows occasionally in response to sufficient precipitation.

4. From the UN-HP ion exchange plant discharge point the Arroyo Del Puerto flows perennially, due to the discharge, for a short distance (approximately 1/2 mile) before the Kerr-McGee discharge is added to it (NPDES No. NM-0020532).

5. Sections 15, 23, and 25, T.14N., R.10W., N.M.P.M. and Section 32, T.14N., R.9W., N.M.P.M., McKinley County, New Mexico, are leased by UN-HP. Kerr-McGee owns Sections 24 and 26, T.14N., R.10W., N.M.P.M., and Section 31, T.14N., R.9W., N.M.P.M., Valencia County, New Mexico. There is no fencing or other physical obstruction which would restrict access to the Arroyo Del Puerto in these sections.

IV. DISCUSSION

The parties on June 14, 1978 stipulated to the above stipulated facts and circumstances. The parties further stipulated that each

party was free to raise any issue of materiality it deems appropriate. The Partnership deems the following stipulated items not material: Stipulation A.2, A.3, A.4, A.5, A.6, A.7, A.9, B.3. The Partnership deems the nature of its organization, its business activities and its uranium sales as not material to this action, since it is stipulated that the Partnership does not withdraw water from the Arroyo Del Puerto. No other industrial use of Arroyo Del Puerto or San Mateo Creek water was claimed. The water used by the Partnership comes from its underground mines and the water is underground seepage water. It derives none of its uranium or water from the Arroyo Del Puerto at all. Likewise, any water treatment performed by the Partnership is not material.

V. PROPOSED FINDINGS OF FACT

The proposed findings of fact are divided into two parts. In Part A, general findings applicable to the parties' general contentions are discussed. More specific findings applicable to the contentions are discussed in Part B. Discussion of evidence and proper interpretation to be given evidence are discussed in the discussion sections after individual findings. References to exhibits and testimony refer to the record developed in the adjudicatory hearing concerning Kerr-McGee Nuclear Corporation's NPDES Permit No. NM-0020532.

A. General Findings of Fact

1. The Kerr-McGee discharge is added to the Partnership discharge in Section 31, T.14N., R.9W., N.M.P.M., McKinley County, New Mexico. The Kerr-McGee discharge is itself from underground mines. Exhibit AL-1/Ganus Testimony 3-4.

2. The total flow in the Arroyo Del Puerto at the point

it leaves Kerr-McGee's property was gauged by Kerr-McGee in February, 1978 at an average of 2 cubic feet per second. Exhibit AL-1/Ganus Testimony at 3/ Transcript at 27.

3. The sole sources of water in the Arroyo Del Puerto are the discharges derived from the Kerr-McGee and Partnership underground mines and intermittent precipitation. Upstream from the Partnership facilities the arroyo is dry except in time of precipitation. It flows only in direct response to precipitation, and receives no water from springs and no long continued supply from melting snow or other surface sources. The same would be true of the entire arroyo in the absence of the Kerr-McGee and Partnership discharges (Exhibits AL-3.A, 3.B, 3.C, and EPA 18 at 2. Ganus testimony at 3, 4; Duggan testimony at 2/Transcript at 149-150). Approximately three miles down gradient from the Kerr-McGee discharge point the Arroyo Del Puerto converges with San Mateo Creek. The U.S. Geologic Survey in 1977 measured an average flow of 0.76 cubic feet per second at its gauging station on the Arroyo Del Puerto approximately 1,000 feet up gradient of the confluence. (Ganus testimony at 5/Transcript at 247).

4. Upstream from the confluence of the Arroyo Del Puerto, the San Mateo Creek itself has as its sole sources of water the Johnny M underground mine and precipitation.

(Transcript at 128; Duggan testimony at 3)

5. The flow of water in San Mateo Creek upgradient from the town of San Mateo (upstream from Johnny M Mine) is insignificant. (Transcript at 128)

6. Flow would be found in the stream only in very major rainfall events, perhaps in the nature of 1,000 year rainfall runoff. (Transcript at 129)

7. Gulf Mineral Resources once discharged water from its underground mine into San Mateo Creek above the confluence with the Arroyo Del Puerto. The average amount of discharge was 13 cubic feet per second. Gulf Mineral Resources' entire discharge has since December, 1977 been diverted so that it no longer flows into San Mateo Creek. (Exhibit EPA 35/Transcript at 237, 259, 303-304)

8. The entire flow of San Mateo Creek is normally absorbed into the alluvium. Typically this occurs approximately 1.3 miles downstream from the confluence of the Arroyo Del Puerto and San Mateo Creek. (Exhibit EPA-18 at 3/ Transcript 150-158, 161, 198-199, 259-263).

DISCUSSION

EPA expert witness John Duggan testified that photographs taken in March of 1978 show the entire flow of San Mateo Creek downgradient from the confluence of the Arroyo Del Puerto disappearing underground approximately 1.3 miles downstream from the point of confluence. (Exhibit EPA-18 at 3/Transcript 150-158) These photographs were taken after local thunderstorm activity, (Transcript at 153) indicating the absorption point shown in the photographs may have been further downstream than normal. Duggan further testified that he inspected the area two

months later and did not observe flow any further downstream than indicated in the March photographs. (Transcript at 161) While EPA's other witness Dr. Charles Nylander testified he saw flow several miles downstream from the final absorption point indicated by Duggan's photographs, the observations were made during the period Gulf Mineral Resources was discharging into San Mateo Creek at a much greater rate than the discharges into the Arroyo Del Puerto by the Partnership and Kerr-McGee. (See EPA Exhibit 35/Transcript 237, 259, 303-304). Dr. Nylander acknowledged in subsequent visits to the area after the Gulf discharge termination he had not observed flow in San Mateo Creek past the absorption points indicated in Mr. Duggan's photographs. (Transcript at 259-263) Other state employees visited the area without reporting San Mateo Creek flowing past the absorption point in the photographs. (Transcript 259-263)

B. Specific Findings:

9. There does not now exist a continuous channel with or without water flow extending San Mateo Creek to the Rio San Jose. There was evidence that at least in the 1930's there was a continuous channel without water, linking San Mateo Creek to the Rio San Jose. No evidence was adduced to indicate that the channel was of recent origin, and is probably a remnant of previous plural conditions existing at a remote date in the Southwest. (Exhibits EPA-31(a)(b) and Southwest 1/Transcript at 129, 224-Ganus Rebuttal Testimony at 5)

DISCUSSION

All of the witnesses agreed there is not now a single channel through which water can flow down San Mateo Creek to the Rio San Jose.

EPA's expert witness, Duggan, testified that the former channel was disrupted and broken up and that there is not now a single channel from the San Mateo Creek to the Rio San Jose. (Transcript 152-153) EPA's witness, Nylander, testified that in the 1930's and 1950's there was a discernible channel, although this was historical. (Transcript at 224) He also testified that the discernible channel that may have existed historically had ended in the 1950's and there was no continuous discernible channel at this time. (Transcript 239-240) Mr. Nylander testified that historically there had been a channel, but he could not testify as to how many years ago, whether 1,000 or 500 years ago or whatever, there might have been flow in a continuous channel. (Transcript at 241-242) Mr. Robinson, called by SRIC, testified that the confluence of San Mateo Creek and the Rio San Jose which could be seen in 1935-36 could no longer be discerned. (Transcript at 320) He did not claim water had been able to get through since the 1950's. (Transcript at 321) Kerr-McGee's expert witness, Dr. William Ganus, testified that the continuous channel (although not continuous flow) noted in 1935-36, was in his opinion a remnant of much earlier and much different climatic, geologic and hydrologic conditions and could have been formed thousands of years ago and has been largely inactive since that time. Ganus rebuttal testimony (at 5, see also Transcript at 129).

10. The Arroyo Del Puerto, San Mateo Creek and the unchanneled lands between San Mateo Creek and the Rio San Jose are subject to flooding in periods of extremely heavy precipitation. There are no records establishing precisely how often severe flooding occurs in this area

or how often, if ever, such flooding could flow over the unchanneled land between the San Mateo Creek and the Rio San Jose. The hydrogeological features of the area and the testimony of local residents indicate the precipitation severe enough to create widespread flooding is very infrequent and that flooding severe enough for water to flow over the unchanneled land between San Mateo Creek and the Rio San Jose is extremely rare, if it ever occurs at all. (Ganus rebuttal testimony at 7, 9-10; Nylander testimony at 5, 7/Transcript at 253, 265-268, 336, 344-348, 373-377, 400-401)

DISCUSSION

Because the San Jose is lower than the unchanneled land between the San Mateo Creek and the Rio San Jose, if a large enough rain occurs, water can flow as a sheet over the lands separating these two. Dr. Ganus testified in his expert opinion even very severe floods in this area would be absorbed into the highly permeable ground. (Ganus rebuttal testimony at 7) Mr. Bert Roundy, who had lived in the area for many years testified that even extremely heavy rains are dispersed across the land and quickly absorbed into the ground. Only a steady rain of three or four days would cause flood waters great enough to flow past the United Nuclear-Homestake Partners mill. Anything less would be absorbed directly into the ground. Mr. Roundy had observed flooding of so severe a nature only once or twice in the last twenty years. (Transcript at 373-377, 400-401) Mr. Carver, a local resident who had been in the area for fewer years than Mr. Roundy, claimed that there had been severe

flooding in the area five or six times, but was only able to identify a 1972 flood. (Transcript at 336) He was unable to testify of his own knowledge there was a continuous link between the Arroyo Del Puerto and the Rio San Jose during this flood. (Transcript at 348) Moreover, Dr. Ganus' testimony showed that someone in the Murray Acres Subdivision, the area where Mr. Carver lives, would be unable to discern whether the waters originated in the Arroyo Del Puerto or in the Lobo Creek area, which is a separate drainage. (See Ganus rebuttal testimony at 9-10) Mr. Roundy had never seen waters flowing in the San Mateo Creek across the area in between San Mateo Creek and the Rio San Jose and enter the San Jose. (Transcript at 375) Under any view of the testimony, it would take an extremely rare event for water to spread across the land between San Mateo Creek and the Rio San Jose and in no event would such a sheet be in a discernible channel. Such an occurrence would most certainly be at intervals longer than the life of an NPDES permit.

11. No scientific evidence has been adduced to establish that the discharge of the Partnership reaches the Rio San Jose, or that there is any discharge of pollutant which reaches the Rio San Jose from the Partnership. (Nylander testimony at 9/Transcript at 263, 294-295) There was no testimony showing that radium or any other pollutant discharged by the Partnership had ever reached the Rio San Jose. (Transcript at 263) Further, in a flood event as large as would be necessary, there would be no discreet discharge of pollution, and the Partnership would be

inactive in the claimed discharge. The character of the discharge would no longer be that of the discharge by the Partnership because of the huge dilution caused by flooding.

12. The waters of San Mateo Creek enter the ground where they are absorbed into the alluvium. A significant part of the groundwater originating from the absorption of San Mateo Creek recharges the aquifers from which it originated. (Ganus Testimony at 5/Transcript 40-46)

13. Part of the groundwater originating from the absorption of San Mateo Creek into the alluvium moves very slowly through various aquifers towards Horace Springs. Horace Springs is located approximately 24.3 miles from the confluence of Arroyo Del Puerto and San Mateo Creek. Such groundwater could not reach Horace Springs sooner than approximately 154 years and may take 500 to 1,000 years.

DISCUSSION

The arguments between the experts was basically between the 154 or 500 to 1,000 years. (Nylander testimony 17-21; Ganus rebuttal testimony 12-14; Transcript 88-109; Nylander testimony 21; Ganus rebuttal testimony at 14/Transcript at 99) There is no question that any groundwater flow would be through a series of widely spread and widely occurring geologic formations through which water could pass. (Ganus testimony 6/Exhibit AL-6)

14. Groundwater originating in the absorption of San Mateo Creek that might bear discharge from the Partnership would not have reached Horace Springs or any other point near Horace Springs. (Transcript at 235-237)

DISCUSSION

Dr. Nylander acknowledged that under normal conditions water since mining began would not have moved significantly toward Horace Springs; perhaps one mile under normal conditions, although it might be increased somewhat by flooding. (Transcript at 235-237) The extent of movement is some 20 miles short of Horace Springs.

15. Part of the groundwater originating from the absorption of San Mateo Creek into the alluvium moves very slowly through the alluvium towards Milan and Grants, New Mexico, approximately 10 to 14 miles respectively from the confluence of San Mateo Creek in the Arroyo Del Puerto. No groundwater originating from absorption of San Mateo Creek since mining has reached wells in the Milan and Grants area, and it will be many, many years before any does. (EPA Exhibits 38, 41; Nylander testimony at 20/Transcript at 279, 295-296)

DISCUSSION

Nylander agreed that groundwater originating from the mining in Ambrosia Lake would not have yet approached anywhere near Milan or Grants. (Transcript at 296) There was no showing of any interstate use of discharge at motels or restaurants in Grants or Milan.

16. It was not established that cattle sold in interstate commerce drink water discharged by the Partnership.

No evidence established that any cattle drank water discharged from the Partnership as part of utilization for industrial purposes by industries in interstate commerce. (EPA Exhibits 30 and 32; Nylander testimony at 16.5; Transcript at 195, 203-04, 373, 379-387, 392-393)

DISCUSSION

EPA attempted to suggest that six cattle from the Roundy ranch were sold to the Karler Packing Company in Albuquerque (EPA Exhibit 30) EPA also introduced evidence that Karler Packing Company operates "regionally." (EPA Exhibit 32) Dr. Nylander testified he had personally seen cattle on the Roundy ranch drink water in San Mateo Creek. (Nylander testimony 16.5)

However, it was not shown that the cows sold to Karler Packing Company ever drank water from the San Mateo Creek. Furthermore, it was not established that Karler Packing Company sells cattle in interstate commerce. The word "regionally" could mean different regions of New Mexico. (Transcript at 203-204) The EPA's evidence is not consistent with that presented by Mr. Roundy. Mr. Roundy testified he has a cow and calf operation. (Transcript at 380-381) He grazes the cows during the winter on the portion of his land through which San Mateo Creek runs, but moves them to other pastures when they calve. It is the calves that are sold, not the cows. A few calves may be in the San Mateo Creek area for just a short time around October. (Transcript at 380) While there, they might drink water from San Mateo Creek "if there is water in it." (Transcript at 380) This water could, of course, be rain water. Many

of the Roundy calves are slaughtered in Albuquerque and returned to Mr. Roundy for sale at a local meat market he runs. (Transcript at 373, 379-380, 393) EPA Exhibits 30D, 30E and 30F seem to relate to such cattle as they are marked "slaughter." Mr. Roundy testified that anyone purchasing meat at his meat market and transporting that meat out of New Mexico would have to do so illegally. (Transcript at 379) Slaughtered calves not returned to Mr. Roundy are put up for auction. EPA Exhibits 30A, 30B and 30C are in this category. There was no evidence that any of these carcasses are sold out of state nor was there any evidence of what happens to them. There was no testimony at all to establish a relationship between use of any water in San Mateo Creek and any sale of cattle in interstate commerce.

VI. PROPOSED CONCLUSION OF LAW

1. EPA's jurisdiction to issue an NPDES Permit to the Partnership under the 1972 amendments to the FWPCA rest on its showing that discharges from that facility flow into navigable waters. 33 U.S.C. §1342, 1362(12)
2. The Partnership's discharge does not flow into navigable waters within the meaning of the 1972 amendments to the FWCPA.
3. EPA has no jurisdiction to issue an NPDES Permit to the Partnership ion exchange facility located in Section 25, T.14N., R.10W., N.M.P.M., McKinley County, New Mexico.

Respectfully submitted,
BIGBEE, STEPHENSON, CARPENTER & CROUT

BY G. Stanley Crout
G. Stanley Crout

Sunny J. Nixon
Sunny J. Nixon
Attorneys for United Nuclear-Homestake Partners

Post Office Box 669
Santa Fe, New Mexico 87501

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:

UNITED NUCLEAR-HOMESTAKE PARTNERS
Grants, New Mexico

NPDES Permit No. NM-0020389

Marvin E. Jones
Administrative Law Judge
1735 Baltimore
Kansas City, Missouri 64108

CERTIFICATE OF SERVICE

I certify that a copy of United Nuclear-Homestake Partners' Requested Findings of Fact and Conclusions of Law and Brief in support thereof were sent of United States Mail to each of the parties listed below on December 15, 1978.

BIGBEE, STEPHENSON, CARPENTER & CROUT

By _____
Attorneys for
United Nuclear-Homestake Partners
Post Office Box 669
Santa Fe, New Mexico 87501

Marvin E. Jones
Administrative Law Judge
U. S. Environmental Protection Agency
1735 Baltimore
Kansas City, Missouri 64108

James D. Bunting
Office of Water Enforcement
U.S. Environmental Protection Agency
401 M Street, SW
Washington, D. C. 20460

Environmental Improvement Division
Post Office Box 2348
Santa Fe, New Mexico 87501

Ms. Denise Fort
Attorney at Law
Route 3, Box 99
Santa Fe, New Mexico 87501

RECORD OF COMMUNICATION

☐ PHONE CALL ☐ DISCUSSION ☐ FIELD TRIP ☐ CONFERENCE

☐ OTHER (SPECIFY)

(Record of item checked above)

TO:	FROM:	DATE / TIME
Cathy [illegible] NMEID (505) 9[illegible]4-0020	[illegible]	DATE 1/20/83 TIME 3:45

SUBJECT Biomonitoring

SUMMARY OF COMMUNICATION

She said that she discussed this with Tony [illegible] and Charles Nylander. They have no objections to incorporation of biomonitoring in N.M. permits. However, the state does not permit due to the capabilities to evaluate this on the facility inspection.

CONCLUSIONS, ACTION TAKEN OR REQUIRED

Recommend that we proceed with biomonitoring in applicable N.M. permits.

INFORMATION COPIES

TO: [illegible]

EPA Form 1300-6 (7-72) REPLACES EPA HQ FORM 5300-3 WHICH MAY BE USED UNTIL SUPPLY IS EXHAUSTED.

pH limits in paragraph 4 of the Fact sheet of 7.3 to 8.6 standard units refer to data in the application.

Paragraph 5 of the Fact sheet refers to the guideline limits of 6.0 to 9.0 standard units which are applied in the permit. Typing had dropped out the last paragraph on page 3 in the last revision.

Hunter

NOV 0 3 1981

Mr. Edward E. Kennedy
Director of Environmental Affairs
Homestake Mining Company
P. O. Box 98
Grant, New Mexico 87020

Re: NPDES Permit No. NM0020389

Dear Mr. Kennedy:

Your application for an NPDES permit was received on September 21, 1981. As specified in Part 124.3(c) of the Consolidated Permit Regulations which were published in the Federal Register on May 19, 1980, your application has been reviewed and determined to be complete.

Thank you for your cooperation. If you have questions concerning this submittal, please contact Ms. Linda Hunter at (214) 767-2765.

Sincerely,

JW 10/21/81

Jayne Watson, Chief
Administrative Issuance Section (6E-PI)

cc: New Mexico Environmental Improvement Division

EA

Hunke

HOMESTAKE MINING COMPANY

P.O. BOX 98
GRANTS, NEW MEXICO
87020

June 23, 1981

Certified Mail

Mr. Oscar Cabra
Industrial Permits Section (6AEWP)
United States Environmental Protection Agency, Region VI
First International Building
1201 Elm Street
Dallas, Texas 75270

Re: Renewal Application for NPDES Permit
No. NM 0020389

Dear Mr. Cabra:

Attached, for your files, is a portion of the analytical information for Homestake Mining Company's, formerly United Nuclear-Homestake Partners', application for NPDES Permit renewal. We are still trying to obtain the balance of the radiological information. Unfortunately, some difficulties have been experienced in the analytical area. This information will be submitted as soon as it becomes available to us. The enclosed analytical information was not available at the time of the renewal application's submittal of December 18, 1980, to the U. S. Environmental Protection Agency.

The comments made in the letter of December 18, 1980, continue to be Homestake Mining Company's position on the matter of the applicability of this permit.

If you have any questions concerning the contents of this material, please don't hesitate to contact me.

Very truly yours,

HOMESTAKE MINING COMPANY

Edward E. Kennedy

Edward E. Kennedy
Director of Environmental Affairs

EEK/vh

cc: J. M. Parker

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

~~D. Hunker 7/28~~
(2) Permit File

DATE: March 12, 1981

SUBJECT: Initial Decision In The Matter Of
United Nuclear - Homestake Partners,
Grants, New Mexico, NPDES Permit No. NM0020389

3/16/81

FROM: Beth Osheim, Attorney
Water Section (6AELW)

TO: Oscar Cabra, Chief
Industrial Permits Section (6AEWP)

Attached is the Initial Decision of the Acting Regional Administrator in the above proceeding. As in the Kerr-McGee decision, this decision concludes that the Arroyo del Puerto is a "navigable water." Consequently, United Nuclear's discharges are subject to NPDES permitting jurisdiction.

If the Initial Decision is not appealed to or ordered reviewed by the Administrator within 30 days following its service, the final permit as drafted will become effective and enforceable.

Attachment

cc: Mike Gibson (6AELW)
Judy Torrence (6AELW)

RECEIVED
MAR 13 1981
6AEP

EPA Form 1320-6 (Rev. 3-76)

Permit No. NM0020389
Application No. NM0020389

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Federal Water Pollution Control Act, as amended, (33 U.S.C. 1251 et. seq; the "Act"),

United Nuclear - Homestake Partners
P.O. Box 98
Grants, New Mexico 87020

is authorized to discharge from a facility located at

United Nuclear - Homestake Partners uranium recovery plant
McKinley County, New Mexico

to receiving waters named

Arroyo del Puerto to San Mateo Creek

in accordance with effluent limitations, monitoring requirements and other conditions set forth in Parts I, II, and III hereof.

This permit shall become effective on

This permit and the authorization to discharge shall expire at midnight,

Signed this day of

A. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

During the period beginning ~~**~~ the effective date and lasting through ~~June 30, 1984~~ the effective date of the other permit
the permittee is authorized to discharge from outfall(s) serial number(s) 001, Mine water

Such discharges shall be limited and monitored by the permittee as specified below:

Effluent Characteristic	Discharge Limitations kg/day (lbs/day)		Discharge Limitations Other Units (Specify)		Monitoring Requirements Measurement Frequency	Monitoring Requirements Sample Type
	Daily Avg	Daily Max	Daily Avg	Daily Max		
Flow—m^3/Day (MGD)	~~N/A~~	~~N/A~~	(0.6)	(1.0)	Continuous	Record
Temperature	N/A	N/A	N/A	*°F	1/week	In Situ.
Total Suspended Solids	N/A	N/A	20 mg/l	30 mg/l	1/week	24 hr. composite
Chemical Oxygen Demand	N/A	N/A	100 mg/l	200 mg/l[1]	1/week	24 hr. composite
Radium 226 (dissolved)	N/A	N/A	3pCi/l	10 pCi/l	1/week	24 hr. composite
Total Radium 226	N/A	N/A	10 pCi/l	30.0pCi/l	1/week	24 hr. composite
~~Total Copper~~	~~N/A~~	~~N/A~~	~~* mg/l~~	~~* mg/l~~	~~1/week~~	~~24 hr. composite~~
Total Uranium	N/A	N/A	2.0 mg/l	4.0 mg/l	1/week	24 hr. composite
Total Zinc	N/A	N/A	0.5 mg/l	1.0 mg/l	1/week	24 hr. composite
Total Molybdenum	N/A	N/A	* mg/l	* mg/l	1/month	24 hr. composite
Total Selenium	N/A	N/A	* mg/l	* mg/l	1/month	24 hr. composite
Total Vanadium	N/A	N/A	* mg/l	~~8~~ mg/l	1/month	24 hr. composite

* Report ~~** See page 2 of 11~~ [1] See Part III, Paragraph ~~C.~~ 2 4.

The pH shall not be less than 6.0 standard units nor greater than 9.0 standard units and shall be monitored 1/week by grab sample.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):
At the outfall from the treatment plant.
~~SE - 1/4 Sec. 24 T17N R13W NMPM~~
~~Latitude 35 deg. 41 min. 09 sec.~~ Latitude 35 deg 24 min 28 sec
~~Longitude 108 deg. 10 min. 19 sec.~~ Longitude 107 deg 50 min 25 sec

EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

During the period beginning July 1, 1984 and lasting through the expiration of this permit. the permittee is authorized to discharge from outfall(s) serial number(s) 001, mine water.

Such discharges shall be limited and monitored by the permittee as specified below:

Effluent Characteristic	Discharge Limitations kg/day (lbs/day)		Discharge Limitations Other Units (Specify)		Monitoring Requirements Measurement Frequency	Monitoring Requirements Sample Type
	Daily Avg	Daily Max	Daily Avg	Daily Max		
Flow—m^3/Day (MGD)	N/A	N/A	(0.6)	(1.0)	Continuous	Record
Temperature	N/A	N/A	N/A	*°F	1/week	In Situ
Total Suspended Solids	N/A	N/A	15 mg/l	30 mg/l	1/week	24 hr. composite
Chemical Oxygen Demand	N/A	N/A	75 mg/l	150 mg/l [1]	1/week	24 hr. composite
Radium 226(dissolved)	N/A	N/A	3pCi/l	10pCi/l	1/week	24 hr. composite
Total Radium 226	N/A	N/A	10pCi/l	30.0pCi/l	1/week	24 hr. composite
Total Uranium	N/A	N/A	2.0 mg/l	4.0 mg/l	1/week	24 hr. composite
Total Copper	N/A	N/A	0.1 mg/l	0.2 mg/l	1/week	24 hr. composite
Total Zinc	N/A	N/A	0.4 mg/l	0.8 mg/l	1/week	24 hr. composite
Total Molybdenum	N/A	N/A	* mg/l	* mg/l	1/month	24 hr. composite
TOtal Selenium	N/A	N/A	* mg/l	* mg/l	1/month	24 hr. composite
Total Vanadium	N/A	N/A	* mg/l	* mg/l	1/month	24 hr. composite

* Report [1] See Part III, Paragraph 5.

The pH shall not be less than 6.0 standard units nor greater than 9.0 standard units and shall be monitored 1/week by grab sample.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):

At the outfall from the treatment plant.
SE - 1/4 Sec. 24 T17N R13W NMPM
Latitude 35 deg. 41 min. 09 sec.
Longitude 108 deg. 10 min. 19 sec.

Latitude 35 Deg 24 min 28 sec
Longitude 107 Deg 50 min 25 sec

B. SCHEDULE OF COMPLIANCE

1. The permittee shall achieve compliance with the effluent limitations specified for discharges in accordance with the following schedule:

Progress Report 12/31/81
Progress Report 6/30/83
Progress Report 12/31/83
Progress Report 3/31/84
Achieve Compliance 7/1/84

None

2. No later than 14 calendar days following a date identified in the above schedule of compliance, the permittee shall submit either a report of progress or, in the case of specific actions being required by identified dates, a written notice of compliance or noncompliance. In the latter case, the notice shall include the cause of noncompliance, any remedial actions taken, and the probability of meeting the next scheduled requirement.

C. MONITORING AND REPORTING

1. *Representative Sampling*

Samples and measurements taken as required herein shall be representative of the volume and nature of the monitored discharge.

2. *Reporting*

Monitoring results obtained during the previous 3 months shall be summarized for each month and reported on a Discharge Monitoring Report Form (EPA No. 3320-1), postmarked no later than the 28th day of the month following the completed reporting period. The first report is due on . Duplicate signed copies of these, and all other reports required herein, shall be submitted to the Regional Administrator and the State at the following addresses:

EPA

New Mexico Environmental Improvement Division

3. *Definitions*

a. The "daily average" discharge means the total discharge by weight during a calendar month divided by the number of days in the month that the production or commercial facility was operating. Where less than daily sampling is required by this permit, the daily average discharge shall be determined by the summation of all the measured daily discharges by weight divided by the number of days during the calendar month when the measurements were made.

b. The "daily maximum" discharge means the total discharge by weight during any calendar day.

4. *Test Procedures*

Test procedures for the analysis of pollutants shall conform to regulations published pursuant to Section 304(g) of the Act, under which such procedures may be required.

5. *Recording of Results*

For each measurement or sample taken pursuant to the requirements of this permit, the permittee shall record the following information:

a. The exact place, date, and time of sampling;

b. The dates the analyses were performed;

c. The person(s) who performed the analyses;

A. MANAGEMENT REQUIREMENTS

1. *Change in Discharge*

All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant identified in this permit more frequently than or at a level in excess of that authorized shall constitute a violation of the permit. Any anticipated facility expansions, production increases, or process modifications which will result in new, different, or increased discharges of pollutants must be reported by submission of a new NPDES application or, if such changes will not violate the effluent limitations specified in this permit, by notice to the permit issuing authority of such changes. Following such notice, the permit may be modified to specify and limit any pollutants not previously limited.

2. *Noncompliance Notification*

If, for any reason, the permittee does not comply with or will be unable to comply with any daily maximum effluent limitation specified in this permit, the permittee shall provide the Regional Administrator and the State with the following information, in writing, within five (5) days of becoming aware of such condition:

a. A description of the discharge and cause of noncompliance; and

b. The period of noncompliance, including exact dates and times; or, if not corrected, the anticipated time the noncompliance is expected to continue, and steps being taken to reduce, eliminate and prevent recurrence of the noncomplying discharge.

3. *Facilities Operation*

The permittee shall at all times maintain in good working order and operate as efficiently as possible all treatment or control facilities or systems installed or used by the permittee to achieve compliance with the terms and conditions of this permit.

4. *Adverse Impact*

The permittee shall take all reasonable steps to minimize any adverse impact to navigable waters resulting from noncompliance with any effluent limitations specified in this permit, including such accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying discharge.

5. *Bypassing*

Any diversion from or bypass of facilities necessary to maintain compliance with the terms and conditions of this permit is prohibited, except (i) where unavoidable to prevent loss of life or severe property damage, or (ii) where excessive storm drainage or runoff would damage any facilities necessary for compliance with the effluent limitations and prohibitions of this permit. The permittee shall promptly notify the Regional Administrator and the State in writing of each such diversion or bypass.

inspection at the offices of the State water pollution control agency and the Regional Administrator. As required by the Act, effluent data shall not be considered confidential. Knowingly making any false statement on any such report may result in the imposition of criminal penalties as provided for in Section 309 of the Act.

4. *Permit Modification*

After notice and opportunity for a hearing, this permit may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:

a. Violation of any terms or conditions of this permit;

b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts; or

c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.

5. *Toxic Pollutants*

Notwithstanding Part II, B-4 above, if a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under Section 307(a) of the Act for a toxic pollutant which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit, this permit shall be revised or modified in accordance with the toxic effluent standard or prohibition and the permittee so notified.

6. *Civil and Criminal Liability*

Except as provided in permit conditions on "Bypassing" (Part II, A-5) and "Power Failures" (Part II, A-7), nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance.

7. *Oil and Hazardous Substance Liability*

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Act.

8. *State Laws*

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by Section 510 of the Act.

PERMIT RATIONALE

Prepared by: Fred Humke
12/20/82

1. United Nuclear - Homestake Partners
   Uranium recovery plant
   NPDES No. NM0020389

2. Permit being reissued for a five year term.

3. A. Consolidated NPDES application, Forms 1 and 2C, submitted by United Nuclear - Homestake Partners on December 22, 1980.

   B. Ore Mining and Dressing Point Source Category, Subpart E guidelines (Uranium, Radium and Vanadium Ores), 40 CFR, Part 440, dated December 3, 1982.

   C. Water Quality Standards for Interstate and Intrastate Streams in New Mexico as amended on March 14, 1978.

   D. Preliminary Contractors Draft Development Document for Proposed Effluent Limitations Guidelines for the Ore Mining and Dressing Point Source Category, dated April 11, 1980.

4. Receiving stream: Arroyo del Puerto to San Mateo Creek in the Rio Grande Basin.

   Effluent is not water quality limited.

5. No compliance schedule is required since BAT/BCT is equivalent to BPT.

6. Outfall 001

   Limitations from the effective date until June 30, 1984 are based on 40 CFR, Part 440.32(a), which is BPT for the Uranium, Radium and Vanadium Ore Mining subcategory under the Ore Mining and Dressing Point Source Category.

   Limitations from July 1, 1984 to the expiration of the permit are based on 440.33(a), which is BAT, and best professional judgment that BCT is equivalent to BPT.

pH limitations are based on State requirements.

~~Fact Sheet~~ - Biomonitoring

Under the provisions of Sections 101 and 308 of the Clean Water Act, a biomonitoring requirement on the treated effluent has been required. The objective of this requirement is to establish the adequacy of Best Available ~~Treatment~~ (BAT) to control toxicity of the treated effluent. Although the effluent may be in compliance with the permitted limits, testing of chemical parameters alone does not measure toxicity which may result when chemicals are combined. The most direct and cost-effective approach to measuring effluent toxicity is to establish the acute toxicity (LC50) of the treated effluent using a static bioassay test.

Technology

In addition to determining the adequacy of the treatment process in removing toxic pollutants, the bioassay information will be used by the State and EPA to assist in determining which receiving waters may have existing or potential use impairments. The effluent bioassay information by itself will not be used to derive permit limits nor used to show cause and effect relationships. Other data gathering such as fixed station monitoring, intensive surveys, fate and effect studies and/or chronic testing would be necessary to establish cause and effect relationships. All of this information together would then become a part of the continuing planning process used to direct attainability studies, site specific criteria modification studies, and water quality permitting requirements.

Biomonitoring has been included in the permit because radium, uranium and zinc (in addition to levels of molybdenum and selenium as indicated in the consolidated application but not addressed by guidelines) are present in the effluent.

6AEWP CONTROL FOR NPDES PERMITS

Permittee United Nuclear NPDES NM0020389

Location or plant name Homestake Partners

☒ Major ☐ Minor ☐ Federal Facility BAT promulgation date ____

☒ Primary Industry ☐ Secondary Industry ☐ New Source ☐ New Discharge

☐ Reissuance of expiring permit ☐ Modification for cause ☐ Start up date ____

PEREXP 7-2-81 New PEREFF ____ New PEREXP ____

Date of application 12/19/81 State drafter ____ EPA Engineer Humke

Date of Public Notice (Draft permit) ____

Code 0503 PERTYP

☐ General (GENERL)
☐ New Source (NEWSOR)
☐ Energy related (ENERGY)
☐ Primary reissued by BPJ (PRIBPJ)
☒ Primary reissued by guidelines (PRIGDE)
☐ Primary energy related - BPJ (PRENBJ)
☐ Primary energy related - guidelines (PRENGD)

Code 1533 PPA

☐ B30601 BAT major primary permits reissued by BPJ
☒ B30602 Major primary permits extended
☐ B30603 BAT major primary permits reissued by guidelines
☐ B30604 Major secondary permits reissued
☐ B30610 New Source permits issued
☐ B30620 Energy related permits issued
☐ B30621 General permits issued

Final Determination

☐ Significant public comments with determination to hold public hearing
☐ Applicable comments (received during 30 day comment period) addressed in modified permit
☐ No comments received during 30 day comment period
☐ AE-4B-3 letter (modification to a proposed permit prepared)
☐ Minor changes
Expected to be controversial
☐ No
☐ Yes (See attached explanation)

____ Signature ____ Date

Date extension letter sent 1-9-81
Code 1117 EXTEND

Date application determined complete ____
Code 1120 APPCOM

Date notice sent to Federal Register ____
Code 1554 SENTFR

Date notice published in Federal Register ____
Code 1556 PUBLFR

Date permit is completed ____
Code 1555 DRFFIN

Permit completed by ____

First supervisory concurrence by ____ Date ____

STEPHENSON, CARPENTER, CROUT & OLMSTED
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Michael S. Yesley
Lindsay A. Lovejoy, Jr.
Patricia J. Turner

June 15, 1983

Mr. Mark Satterwhite
Permits Branch (6W-PS)
U.S. Environmental Protection Agency
First International Building
1201 Elm Street
Dallas, Texas 75270

Re: EPA Proposed NPDES Permit No. NM 0020389

Dear Mr. Satterwhite:

Pursuant to 40 CFR §124.13, applicant, Homestake Mining Company ("HMC"), hereby submits comments on EPA's proposed National Pollutant Discharge Elimination System (NPDES) permit to discharge No. NM 0020389. EPA was notified by letter of April 23, 1981, that HMC became the owner of the entire interest of United Nuclear-Homestake Partners and a request for transfer to HMC of UN-HP's NPDES permit was requested. Consent of both partners was enclosed. HMC's application for this proposed NPDES permit was made in HMC's name and determined complete by EPA according to a November 3, 1981 letter. Accordingly, the permit, if issued, should be in the name of "Homestake Mining Company" and not of "United Nuclear-Homestake Partners." Similarly, references to UN-HP should be changed to Homestake Mining Company.

HMC's comments are discussed within the following general categories but should not be taken as limited to such categories if the comments themselves are more comprehensive.

1. The EPA has no jurisdiction to issue the proposed Permit.

2. The proposed pH limitation should not be so limited.

3. Settlement agreement incorporation.

4. Proposed biomonitoring requirement should be deleted.

5. State Certification should not be conditioned on additional parameters

6. Analysis procedure for total uranium

HMC's particular comments regarding the above subject are set forth in the following pages and the enclosed and incorporated material.

EPA Has No Jurisdiction to Issue the NPDES Permit

Regarding HMC's discharge, the Public Notice states that the discharge of the existing source facility is made into the "Arroyo del Puerto to San Mateo Creek, a water of the United States classified for recreation and support of desirable aquatic life presently common in New Mexico waters."[1] HMC submits that neither the Arroyo nor San Mateo Creek is a "water of the United States" as such term is used in the Federal Water Pollution Control Act Amendment of 1972, as amended (the "Act") and as such term has been construed by the courts in interpreting the Act. The EPA's jurisdiction under the Act covers only discharges into the waters of the United States. In support of its position, HMC points out that the Arroyo del Puerto at the place of discharge is neither a navigable water nor does the discharge move into a navigable water and that the discharge amounts to a discharge upon the surface of the land which is not within the scope of the Act. HMC's predecessor, United Nuclear-Homestake Partners ("UN-HP"), filed an adjudicatory hearing request on June 4, 1976 on the jurisdiction of the EPA to issue a permit to UN-HP No. NM-0020389 (the predecessor of the proposed permit here).[2] One of the issues raised by the applicant in its request for an adjudicatory hearing was whether EPA has NPDES discharge permit jurisdiction to issue a permit pursuant to Federal Water Pollution Control Act Amendments of 1972. An adjudicatory hearing was granted and the applicant filed a stipulation of facts unique to the applicant on June 14, 1978 by the parties. The parties agreed to submit to the Regional Administrator of Region VI as the sole record for use by the Regional Administrator the hearing record developed in the adjudicatory hearing involving Kerr-McGee Nuclear Corporation NPDES Permit No. NM 0020532 with the supplementary stipulation of facts. Applicant and the other parties briefed the issues and submitted proposed findings of fact and conclusions of law in the matter of United Nuclear-Homestate Partners NPDES Permit No. NM 0020389. The Acting Regional Administrator entered an initial decision and findings.

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[1] Moreover, the fact sheet likewise makes reference to the waters of the United States and similarly describes such waters.

[2] Pursuant to a letter of January 13, 1981 from Oscar Cabra, Chief, Industrial Permits Section of the EPA, Region Six, UN-HP was informed that its permit No. NM 0020389 was continued pending the issuance of a new permit.

HMC has petitioned the EPA for review of the Regional Administrator's initial decision.

HMC's arguments and factual grounds supporting its position that EPA does not have jurisdiction to issue the proposed NPDES discharge permit are contained in its Petition for Review, Proposed Finings of Fact and Conclusions of Law, Briefs, Stipulations and the Record In The Matter of United Nuclear-Homestake Partners Grants, New Mexico NPDES Permit No. NM-0020389. Accordingly, it submits and incorporates copies of these documents in support of this issue.[3]

1. United Nuclear-Homestake Partners Comments Pursuant to Public Notice dated April 3, 1976;

2. Request of United Nuclear-Homestake Partners for adjudicatory hearing dated June 4, 1976;

3. Public Notice of August 28, 1976 of adjudicatory hearing in the matter of United Nuclear-Homestake Partners NPDES Permit No. NM-0020389;

4. Stipulation and Agreement between the parties of June 14, 1978;

5. Stipulation of Facts between the parties of June 14, 1978;

6. Hearing transcript in the matter of National Pollutant Discharge Elimination System Permit for Kerr-McGee Corporation, Churchrock, New Mexico NPDES Permit No. NM-0020524 and Kerr-McGee Nuclear Corporation, Ambrosia Lake, New Mexico NPDES Permit No. NM-0020532;[4]

7. Testimony of Dr. Ganus

8. Brief and Reply Brief of United Nuclear-Homestake Partners, NPDES Permit No. NM-0020389;

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[3] EPA holds the original record of this matter. Thus, any part of the record referred to in these comments is incorporated herein. Inasmuch as this proposed permit involves much of the same material as submitted in the record of In The Matter of UN-HP, NPDES Permit No. NM-0020389, it is the same proceeding for purposes of 40 CRF §124.13 and the record may be incorporated by reference.

[4] References throughout these comments to testimony, exhibits and the transcript are to the Kerr-McGee transcript, which is on file with the EPA and is incorporated herein.

9. Proposed Findings of Fact and Conclusions of Law of United Nuclear-Homestake Partners, NPDES Permit No. NM-0020389;

10. Petition for Review of Initial Decision of Regional Administrator in the Matter of United Nuclear-Homestake Partners Grants, New Mexico NPDES Permit No. NM-0020389.

The Public Notice describes the Arroyo del Puerto and San Mateo Creek as classified for "recreation and support of desirable aquatic life presently common in New Mexico waters." No source is shown for such classification. If such classification has been made, it is erroneous.

The EPA Regional Administrator's findings do not contain any reference to aquatic life or recreation in the Arroyo del Puerto or San Mateo Creek or their suitability for such purposes. The findings do not even mention such uses after a thorough hearing on the characteristics and uses of the Arroyo and Creek. The reason is simple. Neither have the water to sustain such life. For example, the evidence showed the entire flow of the San Mateo Creek is normally absorbed into the alluvium. Typically this occurs approximately 1.3 miles downstream from the confluence of the Arroyo del Puerto and San Mateo Creek. (Exhibit EPA-18 at 3/Transcript 150-158, 161, 198-199, 259-263. Other portions of these Comments further demonstrate there is no basis for such a characterization.

As EPA has no jurisdiction to issue a permit and objection has been made to its claimed jurisdiction, EPA should determine no permit is needed for discharge and not issue a permit. If EPA issues a permit, all conditions of the permit and the permit itself should be stayed pending determination of EPA's jurisdiction.

Without waiving or in any manner prejudicing its position and comment on the above issue, HMC addresses the other points concerning the contents of the proposed permit.

The proposed pH Limitation Should Not Be So Limited

HMC's present NPDES permit contains a pH limitation between 6.0 and 9.0, which is the range allowed under EPA's effluent limitation guidelines. 40 CFR §440.52 EPA proposes that the permit contain a limitation of pH between 6.6 and 8.6, stating this is a State requirement. While the present state standard for pH is listed between 6.6 and 8.6, another state regulation makes clear this standard does not apply to any discharge subject to a NPDES permit.[5] Also the state of

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[5] *See* Section 2-100 of the New Mexico Water Quality Control Commission Regulations.

New Mexico informs us it will propose a change in the near future in its present pH standard to 6 to 9. The State informs us that exceptions or variances from the present 6.6 to 8.6 have been allowed in many instances and the State would be amenable to a pH limitation of between 6 and 9.

Thus, the proposed NPDES permit to HMC if it contains any pH limitation, should contain a limit for pH between 6 and 9.

Settlement Agreement Incorporation

The proposed NPDES permit should be written in such a way as to incorporate the proposed changes to Part 122, 124 and 125 of the consolidated permit regulations, pursuant to the settlement agreement entered into by EPA and industry petitioners in the consolidated permit regulations litigation (NRDC v. EPA and consolidated cases No. 80-1607 [D.C. Cir. filed June 2, 1980]. These changes are described by EPA as "reducing the regulatory burdens imposed on permittees" 47 Fed. Reg. p. 52072. Nov. 18, 1982. There are a number of issues settled in the agreement which are not reflected in the proposed permit. At a minimum, Part II, Standard Conditions for NPDES Permits should be amended to include in Section A. a new paragraph which would provide for modification of the permit in conformance with final rules under the settlement.

All of the discharge limitations proposed in the permit should be designated as *net* limitations in conformance with the proposed changes in Section 122.63 (h) of the rules.

Part II, Section B.3, Bypass of Treatment Facilities, of the permit should be modified to reflect the proposed changes in Section 122.60(g) of the rules which would eliminate the restriction prohibiting bypass except where necessary for essential maintenance purposes, so long as such bypass would not cause a violation of the permit effluent limitations or other permit conditions. This proposed change also revises the current rules to make it clear that installation of backup equipment is not necessary unless otherwise called for.

Part II, Section B.4, Upset Conditions, of the permit should be modified to reflect the proposed changes in Section 122.60(h) of the rules consistent with court rulings on this subject.

Part II, Section D-11, Signatory Requirements, of the permit should be modified to reflect the proposed changes in Section 122.6(b)(2) of the rules to allow an individual or position having overall responsibility for environmental matters for the company to sign all applications, reports or information submitted to EPA.

Proposed Biomonitoring Requirement Should Be Deleted

EPA proposes to impose a biomonitoring requirement which contemplates the conduct of certain tests on the treated effluent to establish the adequacy of Best Available Technology (BAT) to control toxicity of the effluent. The rationale for this proposal is not at all clear. Implicit in the intent of the sections of the Clean Water Act referenced by EPA as justification for this proposed monitoring requirement is some reasonable likelihood that HMC's discharge might contain pollutants in concentrations high enough to be toxic. It will not be toxic. Compliance with the effluent limitations prescribed by EPA is required. As EPA is required to list and limit discharge of constituents in toxic quantities, compliance with the limitations will per se preclude toxicity.

EPA further attempts to justify the monitoring requirement by indicating that, "although the effluent may be in compliance with permit limits, treating of chemical parameters alone does not measure toxicity which may result when chemicals are combined." EPA continues its justification by implying State complicity with the program. Inclusion of this requirement is based on the presence of radium, uranium, zinc, selenium and molybdenum in the effluent.

HMC objects to the inclusion of biomonitoring as it presumes the possible presence of aquatic life in the receiving waters. Nothing could be further from the truth. As pointed out in earlier commentary, the arroyo which receives HMC's discharge is a natural arroyo which receives limited precipitation endemic to the area and receives no water from springs or no long-continued supply from melting snow or other surface sources. Besides the intermittent precipitation, the sole sources of water are discharges from the Kerr-McGee and HMC underground mines. (*See*, #3 of Proposed Findings of Fact of UN-HP in NM 0020389 and supporting transcript references). Its physical characteristics are very typical of many other southwestern desert arroyos.

The EPA Regional Administrator's findings do not contain any reference to aquatic life or fish in the Arroyo del Puerto or San Mateo Creek or their suitability for such purposes. The findings do not even mention such uses after a thorough hearing on the characteristics and uses of the Arroyo and Creek. The reason is simple. Neither have the water to sustain such life. For example, the evidence showed the entire flow of the San Mateo Creek is normally absorbed into the alluvium. Typically this occurs approximately 1.3 miles downstream from the confluence of the Arroyo del Puerto and San Mater Creek. (Exhibit EPA-18 at 3/Transcript 150-158, 161, 198-199, 259-2 63)

It is not presumed, much less demonstrated, by any person vaguely familiar with the condition of this receiving water that desirable aquatic life would be present. Further, there was no evidence to establish that HMC's discharge reaches the Rio San Jose or

any discharge of any pollutant reaches the San Jose. (Tr. at 263, 294-295) Even assuming *arguendo* a severe flood were to occur to carry water from the San Mateo Creek to the Rio San Jose, the amounts of constituents of concern to EPA would be so minute as to be totally undetectable. Moreover, the record did not support such a flood. The record showed that flooding severe enough for water to flow over the unchannelled land between the San Mateo Creek and the Rio San Jose is extremely rare, if it ever occurs at all. (Ganus rebuttal testimony at 7, 9-10; Nylander testimony at 5, 7/Tr. at 253, 265-268, 336, 344-348, 373-377, 400-401).

We also understand the State is concerned such a monitoring requirement is excessive.

Clearly, the cost for such a requirement is excessive and unwarranted for no justifiable benefit. The monitoring proposed has been estimated to cost $5500 per year not including shipping and labor for gathering and sample preparation. There is no benefit at all. The EPA's own findings do not reference any aquatic life to be protected. The water itself is absorbed into the alluvium in this arid climate. EPA admits the results from such monitoring program would not be used to derive permit limits. Accordingly, EPA does not have the statutory jurisdiction under either section of the Clean Water Act EPA cites (§§101 or 308) to impose such a requirement. The biomonitoring requirement would be no more than a superfluous and costly academic exercise for the discharger and should be deleted from the proposed permit.

HMC is a part of the depressed uranium mining industry which cannot afford such unjustified and unnecessary costs. More than 5,500 of the over 7,500 employees of the uranium industry in Northwest New Mexico are unemployed. Northwest New Mexico was the largest uranium producing area in the United States. Unjustified requirements such as the biomonitoring requirement will only further depress an already beleagured industry and this discharger.

State Certification should not be conditioned on additional parameters

The State of New Mexico has notified HMC by letter of May 26, 1983, it intends to impose additional parameters as a condition to State Certification. Apparently, the State proposes monitoring analysis, and reporting requirements for the four parameters set forth: Lead-210, Polonium-210, Barium and Manganese. HMC objects to the additional parameters.

Measuring and analyzing weekly for these constituents will be inordinately time consuming and expensive for the insignificant concentrations involved. Polonium-210 has been dropped from the New Mexico Environmental Improvement Division ("EID") Radiation Pro-

tection Bureau analytical list because nothing above extremely insignificant values has ever been observed. Further, before Polonium-210 would begin to approach the limit set forth in Part 4 of the New Mexico Radiation Regulations, certain other radionuclides already analyzed would exceed their limits. Thus, excessive readings of other radionuclides, including Radium-226 and uranium, would be sufficient indicators of anything other than negligible Polonium-210 concentrations. Moreover, inasmuch as concentrations of these radionuclides are limited under the proposed NPDES discharge permit, the concentrations of Polonium-210 must necessarily be maintained at below concentrations set forth in Part 4 of the New Mexico Radiation Protection levels and thus the public health consistently would be protected.

Further, Lead-210, Barium and Manganese should not be measured, sampled and analyzed since less than detectable values of these constituents are all that have been observed. These are analyzed *quarterly* now under HMC's New Mexico radiation license. As less than detectable values are involved, there would be no reason to sample and to dramatically increase the cost and time involved. For example, for Lead-210 three weeks are involved before the results are obtained.

If these parameters were considered necessary for effluent limitation, they would already be included in the effluent limitations in EPA's Uranium, Radium and Vanadium Ores Subcategory. They are not. Likewise, they should not be added to HMC's permit.

Moreover, the State proposes that certain provisions of the Water Quality Standards for Interstate and Intrastate Streams in New Mexico should be inserted in Part III of HMC's permit. HMC objects to this insertion. These standards do not apply. HMC's discharge is to neither an interstate or intrastate stream but to an arroyo for which the sole sources of water are the discharges derived from the Kerr-McGee and Partnership underground mines and intermittent precipitation. Upstream from the Partnership facilities the arroyo is dry except in time of precipitation. It flows only in direct response to precipitation, and receives no water from springs and no long continued supply from melting snow or other surface sources. The same would be true of the entire arroyo in the absence of the Kerr-McGee and Partnership discharges (Exhibits AL-3.A, 3.B, 3.C, and EPA 18 at 2. Ganus testimony at 3, 4; Duggan testimony at 2/Transcript at 149-150). Approximately three miles down gradient from the Kerr-McGee discharge point the Arroyo del Puerto converges with San Mateo Creek. The U.S. Geologic Survey in 1977 measured an average flow of 0.76 cubic feet per second at its guaging station on the Arroyo del Puerto approximately 1,000 feet up gradient of the confluence. (Ganus testimony at 5/Transcript at 247).

Further, the entire flow of San Mateo Creek is normally absorbed into the alluvium. Typically this occurs approximately 1.3 miles downstream from the confluence of the Arroyo del Puerto and San Mateo Creek. (Exhibit EPA-18 at 3/Transcript 150-158, 161, 198-199, 259-263).

There does not now exist a continuous channel with or without water flow extending the San Mateo Creek to the Rio San Jose. There was evidence that at least in the 1930s there was a continuous channel without water, linking San Mateo Creek to the Rio San Jose. No evidence was adduced to indicate that the channel was of recent origin and is probably a remnant of previous plural conditions existing at a remote date in the Southwest. (Exhibits EPA-31(a)(b) and Southwest 1/Transcript at 129, 224-Ganus Rebuttal Testimony at 5).

The Arroyo del Puerto, San Mateo Creek and the unchanneled lands between San Mateo Creek and the Rio San Jose are subject to flooding in periods of extremely heavy precipitation. There are no records establishing precisely how often severe flooding occurs in this area or how often, if ever, such flooding could flow over the unchanneled land between the San Mateo Creek and the Rio San Jose. The hydrolgeological features of the area and the testimony of local residents indicate the precipitation severe enough to create widespread flooding is very infrequent and that flooding severe enough for water to flow over the unchanneled land between San Mateo Creek and the Rio San Jose is ectremely rare, if it ever occurs at all. (Ganus rebuttal testimony at 7, 9-10; Nylander testimony at 5, 7/ Transcript at 253, 265-268, 336, 344-348, 373-377, 400-401).

Thus, essential ingredients to intrastate and interstate streams are missing from the Arroyo del Puerto and San Mateo Creek. For example, the entire flow is absorbed into the alluvium and there is no continuous channel.[6]

Additionally, the purposes of the general standards which the State wishes to incorporate, are to protect surface waters suitable for recreation and to support desirable aquatic life. The Arroyo del Puerto and San Mateo Creek do not support either aquatic life or recreation. EPA's findings in the Matter of UN-HP's NPDES Permit NM 0020389 of March 11, 1981 do not contain any reference to aquatic life or recreational uses in the Arroyo del Puerto or San Mateo Creek. The findings do not even mention such uses after a thorough hearing on the characteristics and uses of the Arroyo and the Creek. The reason is simple. Neither have the water to sustain such life.

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[6] For a more elaborate discussion showing the Arroyo del Puerto and San Mateo Creek are not interstate or intrastate streams, *see*, the materials submitted with these comments, described in the discussion on jurisdiction and incorporated herein.

Finally, the inclusions the State suggests are not necessary for the discharge to comply with Section 301, 302, 303, 306 and 307 of the Act, and are not necessary for State certification.

Analysis Procedure for Total Uranium

Part III, Other Conditions of the Permit, proposes that the total uranium be analyzed for using a specifically prescribed procedure contained in the *HASL Procedural Manual* or an equivalent method.

HMC requests that the colormetric method be substituted as a more acceptable method for analysis for total uranium. This method is more analytically sensitive to lower levels and can detect such levels with greater accuracy. HMC already uses this method and the New Mexico Radiation Protection Bureau has approved it.

Very truly yours,

G. Stanley Crout

Sunny J. Nixon

Attorneys for Homestake
Mining Company

GSC/SJN:pfm

cc: Charles Nylander
New Mexico Environmental
Improvement Division

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ANDREW M. IVES, JR.

MICHAEL R. COMEAU
LARRY D. MALDEGEN

April 30, 1976

RECEIVED
MAY 4 1976
6AEP

Ms. Carol Young
U.S. Environmental Protection Agency
Region VI
Permits and Support Branch (6-AEP)
1600 Patterson - Suite 1100
Dallas, Texas 75201

Dear Ms. Young:

Enclosed please find United Nuclear-Homestake Partners' comments, pursuant to Public Notice dated April 3, 1976, in regard to a proposed Permit No. NM0020389.

Thank you for allowing United Nuclear-Homestake Partners the opportunity to comment on the proposed Permit.

BIGBEE, CARPENTER AND CROUT

By Richard N. Carpenter
On behalf of
United Nuclear-Homestake Partners

RNC/tcg - sn

Enclosure

UNITED NUCLEAR-HOMESTAKE PARTNERS

Comments Pursuant to Public Notice Dated April 3, 1976

United Nuclear-Homestake Partners' comments with regard to the proposed Permit are as follows:

1. The EPA has no jurisdiction to issue the Permit. Paragraph number 3 on page three of the Public Notice indicates that the discharge is "into Arroyo del Puerto into San Mateo Creek, a water of the United States. . . " United Nuclear-Homestake Partners respectfully submits that neither the arroyo nor San Mateo Creek is "a water of the United States" as such term is used in the Federal Water Pollution Control Act Amendments of 1972 (the "Act") and as such term has been construed by the courts in interpreting the Act. The EPA's jurisdiction under the Act covers only discharges into the waters of the United States. Therefore, United Nuclear-Homestake Partners requests that the EPA make a finding that United Nuclear-Homestake Partners' proposed discharge will not be into the waters of the United States and deny to issue a permit for such discharge. In support of its position, United Nuclear-Homestake Partners would like to point out that San Mateo Creek at the place of discharge is neither a navigable water nor a tributary of a navigable water and that the discharge amounts to a discharge upon the surface of the land which is not within the scope of the Act.

2. In the alternative, the EPA should stay the Permit proceedings. The effluent limitations set forth in the proposed Permit are substantially patterned after those limitations found in the Interim Final Effluent Guidelines and Standards applicable to the Ore Mining and Dressing Industry, 40 Fed. Reg. 51722-37 (November 6, 1975). These Guidelines are under serious legal challenge in a number of cases including, American Mining Congress, et al. v. EPA No. 76-1061 (10th Cir., filed February 2, 1976), United Nuclear-Homestake Partners v. EPA No. 76-1069 (10th Cir.) and United Nuclear Corporation v. EPA No. 76-1070 (10th cir.). It is United Nuclear-Homestake Partners' understanding that because of the issues raised by these suits and because of additional technical information and review, the Administrator of the EPA intends to suspend the guidelines as they relate to the uranium mining and milling industry. United Nuclear-Homestake Partners believes that the Interim Final Guidelines as they relate to the uranium industry cannot be supported from a technical, scientific and legal standpoint, and it appears that the Administrator of the EPA concurs in such a belief to some extent.. United Nuclear-Homestake Partners contends that it would be inappropriate for Region VI to ignore this action by the Administrator, and United Nuclear-Homestake Partners further contends that it should not be subjected to complying with guidelines which cannot be met with available technology. Therefore, United Nuclear-Homestake Partners recommends that its Permit proceedings be stayed until the EPA issues Final Guidelines relative to the uranium industry.

3. Paragraph number 1 of Part III of the proposed Permit on page 10 should be deleted in its entirety. This requirement provides that "provisions shall be made to assure the elimination of all seepage, overflow or other sources which may result in any direct or indirect surface discharge other than authorized by this Permit." United Nuclear-Homestake Partners believes that such a requirement is patently outside of the EPA's authority and jurisdiction under the Act. As briefly set forth in comment number 1 above, the EPA's authority and jurisdiction under the Act extend only to discharges to navigable waters. Certainly seepage, overflow, etc. which may result in a discharge to the surface cannot reasonably be construed as a discharge into navigable waters.

Thank you for allowing United Nuclear-Homestake Partners the opportunity to comment on the proposed Permit.

UNITED NUCLEAR-HOMESTAKE PARTNERS
by Bigbee, Carpenter & Crout

By Richard H. Carpenter
Attorneys for
United Nuclear-Homestake Partners

MAY 20 1983

CERTIFIED MAIL: RETURN RECEIPT REQUESTED (P333 702 931)

Mr. Edward E. Kennedy
Director of Environmental Affairs
United Nuclear - Homestake Partners
P.O. Box 98
Grants, New Mexico 87020

Re: Application to Discharge to Waters of the United States
Permit No. NM0020389

Dear Mr. Kennedy:

Enclosed is the public notice, fact sheet, and a copy of the permit which this agency has drafted under the authority of the National Pollutant Discharge Elimination System. A copy of the final permit will be mailed to you when the agency has made a final permit decision.

Should you have any questions concerning any part of the permit, please feel free to contact the Permits Branch at the above address or telephone (214) 767-4375.

Sincerely,

/s/Myron O. Knudson

Myron O. Knudson, P.E.
Director
Water Management Division (6W)

Enclosures

cc w/permit copy:
New Mexico Environmental Improvement Division

12/27/82

12/17/81:HUMKE:kw:NM20389:BIV:351HUM02-24
6W-PI 6W-P

Cabra 1/3/83 Hannesschlager 1/3/83

3/25

Advertising Order Number 3T-3206-NALX
U.S. Environmental Protection Agency
Public Notice of Draft NPDES Permit(s)

May 21, 1983

This is to give notice that the U.S. Environmental Protection Agency, Region 6, has formulated a Draft Permit for the following facility (facilities) under the National Pollutant Discharge Elimination System. Development of the draft permit(s) was based on a preliminary staff review by EPA, Region 6, and consultation with the State of New Mexico. The permit(s) will become effective within 30 days after the close of the comment period unless:

a. The State of New Mexico denies or requests an extension for certification prior to that date.

b. Comments received prior to June 20, 1983 warrant a public notice of EPA's final permit decision.

c. A public hearing is held requiring delay of the effective date.

EPA's contact person for submitting written comments, requesting information regarding the draft permit, and/or obtaining copies of the permit and the Statement of Basis or Fact Sheet is:

Mr. Mark Satterwhite
Permits Branch (6W-PS)
U.S. Environmental Protection Agency
Interfirst Two Building
1201 Elm Street
Dallas, Texas 75270
(214) 767-2765

EPA's comments and public hearing procedures may be found at 40 CFR 124.10 and 124.12 (Federal Register volume 45, No. 98, Monday, May 19, 1980). The comment period during which written comments on the draft permit may be submitted extends for 30 days from the date of this Notice. During the comment period, any interested person may request a Public Hearing by filing a written request which must state the issues to be raised. A public hearing will be held when EPA finds a significant degree of public interest.

EPA will notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. A final permit decision means a final decision to issue, deny, modify, revoke or reissue, or terminate a permit. Any person may request an Evidentiary Hearing on the agency's final permit decision. However, the request must be submitted within 30 days of the date of the final permit decision and be in accordance with the requirements of 40 CFR 124.74. Any condition(s) contested in a request for an evidentiary hearing on an Existing Source may be stayed if the request for a hearing is granted. If any condition(s) contested in a request for an evidentiary hearing are granted on a New Source, New Discharger, or Recommencing Discharger the applicant shall be without a permit.

Further information including the administrative record may be viewed at the above address between 8 a.m. and 4:30 p.m., Monday thru Friday.

1. NPDES authorization to discharge to waters of the United States, permit No. NM0020389.

The applicant's mailing address is: United Nuclear - Homestake Partners
P.O. Box 98
Grants, New Mexico 87020

The discharge from this existing source facility is made into Arroyo del Puerto to San Mateo Creek, a water of the United States classified for recreation and support of desirable aquatic life presently common in New Mexico waters. The discharge is located on that water in the Ambrosia Lake mining area approximately 25 miles north of Grants, New Mexico. A fact sheet is available. Under the standard industrial classification (SIC) code 1094, the applicant's activities are the recovery by ion exchange of uranium from mine water.

The changes from the previously issued permit are:

pH limitations are revised based on state requirements.

2. NPDES authorization to discharge to waters of the United States, permit No. NM0020401.

The applicant's mailing address is: UNC Mining and Milling
P.O. Box QQ
Gallup, New Mexico 87301

The discharge from this exisitng source facility is made into an unnamed arroyo and thence to the Puerco River, a water of the United States classified for recreation and support of desirable aquatic life presently common in New Mexico waters. The discharge is located on that water approximately 15 miles northeast of Gallup, New Mexico, on State Highway 556 (Section 35, T17N, R16W) in McKinley County. A fact sheet is available. Under the standard industrial classification (SIC) code 1094, the applicant's activities are the mining of uranium ore.

The changes from the previously issued permit are:

Total dissolved solids limitations of 2000 lbs/day daily average are added to meet the Colorado River Salinity Standards. pH limitations are revised based on state requirements.

3. NPDES authorization to discharge to waters of the United States, permit No. NM0028169.

The applicant's mailing address is: Kerr-McGee Nuclear Corporation
P.O. Box 25861
Oklahoma City, Oklahoma 25861

The discharge from this existing facility is made into an unnamed arroyo to Canon de Piiojo, to Saledo Creek, to Rio Puerco and thence to the Rio Grande, a water of the United States classified for irrigation; limited warmwater fishery; livestock and wildlife watering; and secondary contact recreation. The discharge is located on that water at the Rio Puerco Mine, which is eight miles southeast of Marquez, Sandoval County, New Mexico, at Section W/2 of 18, T12N, R3W. A fact sheet is available. Under the standard industrial classification (SIC) code 1094, the applicant's activities are the mining of uranium ore.

The changes from the previously issued permit are:

1. pH limitations are changed to within the range of 6.6 to 8.6 standard units in accordance with state requirements.

2. An additional control point 01A is added for sanitary wastewater discharge.

3. A biomonitoring requirement is added to outfall 001.

4. NPDES authorization to discharge to waters of the United States, permit No. NM0028215.

The applicant's mailing address is: Bokum Resources Corporation
P.O. Box 1833
Santa Fe, New Mexico 87501

The discharge from this existing source is made into an unnamed tributary of Canon de Seco to Salado Creek, a tributary to Rio Puerco and Rio Grande River, a water of the United States classified for recreation and support of desirable aquatic life presently common in New Mexico waters. The discharge is located on that water near Marquez, New Mexico at the Marquez Mine. A fact sheet is available. Under the standard industrial classification (SIC) code 1094, the applicant's activities are the production of uranium ore.

The changes from the previously issued permit are:

1. pH limitations are changed to within the range of 6.6 to 8.6 standard units based on state requirements.

2. A biomonitoring requirement is added to outfall 001.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VI
1201 ELM STREET
DALLAS, TEXAS 75270

FACT SHEET

For proposed National Pollutant Discharge Elimination System (NPDES) permit to discharge No. NM0020389 to waters of the United States.

Issuing office: Environmental Protection Agency
Region VI
1201 Elm Street
First International Building
Dallas, Texas 75270

Applicant: United Nuclear - Homestake Partners
P.O. Box 98
Grants, New Mexico 87020

1. The applicant currently operates the United Nuclear - Homestake Partners uranium recovery plant.

2. As described in the application, the plant site is located in McKinley County, New Mexico. Discharge is to Arroyo del Puerto to San Mateo Creek in the Rio Grande Basin.

3. The known uses of the receiving waters are recreation and support of desirable aquatic life presently common in New Mexico waters

Stream standards are: General Standards are found in Section C, pages 2-5, of the Water Quality Standards for Interstate and Intrastate Streams in New Mexico, as revised on March 14, 1978.

4. The following is a quantitative description of the discharge described in the application:

a.

Flow Frequency	Avg. Daily, MGD	Max., MGD	Min., MGD
Outfall 001	0.54	1.01	N/A

b.

Temp., Deg. F	Avg. Summer	Avg. Winter	Max.	Min.
Outfall 001	66	48	68	N/A

c. Outfall No. 001

Effluent Characteristics	Daily Avg. mg/l	Daily Max. mg/l
Total Suspended Solids	N/A	N/A
Chemical Oxygen Demand	N/A	N/A
Radium 226 (dissolved)	N/A	N/A
Total Radium 226	N/A	16 pCi/l

Effluent Characteristics	Daily Avg. mg/l	Daily Max. mg/l
Total Uranium	N/A	N/A
Total Copper	N/A	N/A
Total Zinc	N/A	0.25

pH within the range of 7.3 to 8.6 standard units.

5. On the basis of preliminary staff review, the Environmental Protection Agency, after consultation with the State of New Mexico has made a tentative determination to issue a permit for the discharge described in the application.

The proposed effluent limitations for those pollutants proposed to be limited are as follows:

Outfall 001 Begin the effective date; End the expiration of this permit

Effluent Characteristics	Discharge Limitation 30-day Avg.	Daily Max.
Total Suspended Solids	20 mg/l	30 mg/l
Chemical Oxygen Demand	100 mg/l	200 mg/l
Radium 226 (dissolved)	3 pCi/l	10 pCi/l
Total Radium 226	10 pCi/l	30 pCi/l
Total Uranium	2.0 mg/l	4.0 mg/l
Total Zinc	0.5 mg/l	1.0 mg/l

pH within the range of 6.6 to 8.6 standard units.

6. A brief explanation of the express statutory or regulatory provisions on which permit requirements are based, including appropriate supporting references to the Administrative Record required by 40 CFR §124.35.

A. Consolidated NPDES application, Forms 1 and 2C, submitted by United Nuclear - Homestake Partners on December 22, 1980.

B. Ore Mining and Dressing Point Source Category, Subpart E guidelines (Uranium, Radium and Vanadium Ores), 40 CFR, Part 440, dated December 3, 1982.

C. Water Quality Standards for Interstate and Intrastate Streams in New Mexico as amended on March 14, 1978.

D. Preliminary Contractors Draft Development Document for Proposed Effluent Limitations Guidelines for the Ore Mining and Dressing Point Source Category, dated April 11, 1980.

7. The following is an explanation of calculations or other necessary explanation of the derivation of specific effluent limitations and conditions, including a citation to the applicable guidelines of standard provisions as required under 40 CFR §122.15 and reasons why these are applicable.

Outfall 001

Limitations from the effective date until June 30, 1984 are based on 40 CFR, Part 440.32(a), which is BPT (best practicable control technology currently available) for the Uranium, Radium and Vanadium Ore Mining subcategory under the Ore Mining and Dressing Point Source Category.

Limitations from July 1, 1984 to the expiration of the permit are based on 440.33(a), which is BAT, and best professional judgment that BCT is equivalent to BPT.

pH limitations are based on state requirements.

Under the provisions of Sections 101 and 308 of the Clean Water Act, a biomonitoring requirement on the treated effluent has been required. The objective of this requirement is to establish the adequacy of Best Available Technology (BAT) to control toxicity of the treated effluent. Although the effluent may be in compliance with the permitted limits, testing of chemical parameters alone does not measure toxicity which may result when chemicals are combined. The most direct and cost-effective approach to measuring effluent toxicity is to establish the acute toxicity (LC50) of the treated effluent using a static bioassay test.

In addition to determining the adequacy of the treatment process in removing toxic pollutants, the bioassay information will be used by the State and EPA to assist in determining which receiving waters may have existing or potential use impairments. The effluent bioassay information by itself will not be used to derive permit limits nor used to show cause and effect relationships. Other data gathering such as fixed station monitoring, intensive surveys, fate and effect studies and/or chronic testing would be necessary to establish cause and effect relationships. All of this information together would then become a part of the continuing planning process used to direct attainability studies, site specific criteria modification studies, and water quality permitting requirements.

Biomonitoring has been included in this permit because radium, uranium and zinc (in addition to levels of molybdenum and selenium as indicated in the consolidated application but not addressed by guidelines) are present in the effluent.

8. The permit is in the process of certification by the State Agency. A draft permit and draft public notice will be sent to the District Engineer, Corps of Engineers and to the Regional Director of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service prior to the publication of that notice.

9. The public notice describes the procedures for the formulation of final determinations.

PROPOSED
PERMIT

Permit No. NM0020389
Application No. NM0020389

AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Federal Water Pollution Control Act, as amended, (33 U.S.C. 1251 et. seq; the "Act"),

United Nuclear - Homestake Partners
P.O. Box 98
Grants, New Mexico 87020

is authorized to discharge from a facility located at

United Nuclear - Homestake Partners
recovery plant
McKinley County, New Mexico

to receiving waters named Arroyo del Puerto to San Mateo Creek

in accordance with effluent limitations, monitoring requirements and other conditions set forth in Parts I, II, and III hereof.

This permit shall become effective on

This permit and the authorization to discharge shall expire at midnight,

Signed this day of

Myron O. Knudson

Myron O. Knudson, P.E.
Director, Water Management Division (6W)

Effluent Characteristic	Monitoring Requirements	
	Measurement Frequency	Sample Type
Flow-m^3/Day (MGD)	Continuous	Record
Temperature	1/week	In Situ
Total Suspended Solids	1/week	24-hr. composite
Chemical Oxygen Demand	1/week	24-hr. composite
Radium 226 (dissolved)	1/week	24-hr. composite
Total Radium 226	1/week	24-hr. composite
Total Uranium	1/week	24-hr. composite
Total Zinc	1/week	24-hr. composite
Total Molybdenum	1/month	24-hr. composite
Total Selenium	1/month	24-hr. composite
Total Vanadium	1/month	24-hr. composite
Biomonitoring***	N/A	****

* Report
** See Part III, Paragraph 4.
*** See Part III, Paragraph 5.
**** See Part III, Paragraph 6.

The pH shall not be less than 6.6 standard units nor greater than 8.6 standard units and shall be monitored 1/week by grab sample.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s): At the discharge pipe from the ion exchange plant.

Latitude 35° 39' 20"
Longitude 108° 30' 28".

SECTION B. SCHEDULE OF COMPLIANCE

The permittee shall achieve compliance with the effluent limitations specified for discharges in accordance with the following schedule:

NONE

PART II
STANDARD CONDITIONS FOR NPDES PERMITS

SECTION A. GENERAL CONDITIONS

1. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

2. Penalties for Violations of Permit Conditions

The Clean Water Act provides that any person who violates a permit condition implementing sections 301, 302, 306, 307, 308, 318, or 405 of the Clean Water Act is subject to a civil penalty not to exceed $10,000 per day of such violation. Any person who willfully or negligently violates permit conditions implementing sections 301, 302, 306, 307, or 308 of the Clean Water Act is subject to a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or both.

3. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this permit, including such accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying discharge.

4. Permit Actions

This permit may be modified, revoked and reissued, or terminated for cause including, but not limited to, the following:

a. Violation of any terms or conditions of this permit;

b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts; or

c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.

The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

5. Toxic Pollutants

Notwithstanding paragraph A-4, above, if a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under Section 307(a) of the Act for a toxic pollutant which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit, this permit shall be modified or revoked and reissued to conform to the toxic effluent standard or prohibition and the permittee so notified.

The permittee shall comply with effluent standards or prohibitions established under section 307(a) of the Clean Water Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

6. Civil and Criminal Liability

Except as provided in permit conditions on "Bypassing" Section B, Paragraph B-3 and "Upsets" Section B, Paragraph B-4, nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance.

7. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Act.

8. State Laws

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by Section 510 of the Act.

9. Property Rights

The issuance of this permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

10. Severability

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

SECTION B. OPERATION AND MAINTENANCE OF POLLUTION CONTROLS

1. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems only when necessary to achieve compliance with the conditions of the permit.

2. Duty to Halt or Reduce Activity

Upon reduction, loss, or failure of the treatment facility, the permittee shall, to the extent necessary to maintain compliance with its permit, control production or all discharges or both until the facility is restored or an alternative method of treatment is provided. This requirement applies, for example, when the primary source of power of the treatment facility fails or is reduced or lost. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

3. Bypass of Treatment Facilities

a. Definitions

(1) "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.

(2) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

b. Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs c and d of this section.

c. Notice

(1) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass.

(2) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in Section D, Paragraph D-6 (24-hour notice).

d. Prohibition of bypass.

(1) Bypass is prohibited and the Director may take enforcement action against a permittee for bypass, unless:

(a) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(b) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if the permittee could have installed adequate backup equipment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(c) The permittee submitted notices as required under paragraph c of this section.

(2) The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph d(1) of this section.

4. Upset Conditions

a. Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

b. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of paragraph c of this section are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

c. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

(1) An upset occurred and that the permittee can identify the specific cause(s) of the upset;

(2) The permitted facility was at the time being properly operated; and

(3) The permittee submitted notice of the upset as required in Section D, Paragraph D-6.

(4) The permittee complied with any remedial measures required under Section A, Paragraph A-3.

d. Burden of proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

5. Removed Substances

Solids, sludges, filter backwash, or other pollutants removed in the course of treatment of control of wastewaters shall be disposed of in a manner such as to prevent any pollutant from such materials from entering navigable waters.

SECTION C. MONITORING AND RECORDS

1. Representative Sampling

Samples and measurements taken as required herein shall be representative of the volume and nature of the monitored discharge. All samples shall be taken at the monitoring points specified in this permit and, unless otherwise specified, before the effluent joins or is diluted by any other wastestream, body of water, or substance. Monitoring points shall not be changed without notification to and the approval of the Director.

2. Flow Measurements

Appropriate flow measurement devices and methods consistent with accepted scientific practices shall be selected and used to insure the accuracy and reliability of measurements of the volume of monitored discharges. The devices shall be installed, calibrated and maintained to insure that the accuracy of the measurements are consistent with the accepted capability of that type of device. Devices selected shall be capable of measuring flows with a maximum deviation of less than $\pm$ 10% from true discharge rates throughout the range of expected discharge volumes. Guidance in selection, installation, calibration and operation of acceptable flow measurement devices can be obtained from the following references:

a. "A Guide to Methods and Standards for the Measurement of Water Flow", U. S. Department of Commerce, National Bureau of Standards, NBS Special Publication 421, May 1975, 97 pp. (Available from the U. S. Government Printing Office, Washington, D. C. 20402. Order by SD catalog No. C13.10:421).

b. "Water Measurement Manual", U. S. Department of Interior, Bureau of Reclamation, Second Edition, Revised Reprint, 1974, 327 pp. (Available from the U. S. Government Printing Office, Washington, D. C. 20402. Order by Catalog No. I27.19/2:W29/2, Stock No. S/N 24003-0027).

c. "Flow Measurement in Open Channels and Closed Conduits, U. S. Department of Commerce, National Bureau of Standards, NBS Special Publication 484, October 1977, 982 pp. (Available in paper copy or microfiche from National Technical Information Service (NTIS), Springfield, VA 22151. Order by NTIS No. PB-273 535/5ST).

d. "NPDES Compliance Sampling Manual", U. S. Environmental Protection Agency, Office of Water Enforcement, Publication MCD-51, 1977, 140 pp. (Available from the General Services Administration (8FFS), Centralized Mailing Lists Services, Building 41, Denver Federal Center, Denver, CO 80225.)

3. Monitoring Procedures

Monitoring must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this permit.

4. Penalties for Tampering

The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

5. Reporting of Monitoring Results

Monitoring results must be reported on a Discharge Monitoring Report (DMR) form (EPA No. 3320-1). Monitoring results obtained during the previous three months shall be summarized for each month and reported on a DMR form postmarked no later than the 28th day of the month following the completed reporting period. The first report is due _____. Duplicate copies of DMR's signed and certified as required by Section D, Paragraph D-11, and all other reports required by Section D, Reporting Requirements, shall be submitted to the Regional Administrator and the State at the following addresses:

Myron O. Knudson, P.E., Director
Water Management Division (6W)
U.S. Environmental Protection Agency
Region VI
First International Building
1201 Elm Street
Dallas, Texas 75270

Charles Nylander, Program Manager
Surface Water Section
Water Pollution Control Bureau
New Mexico Environmental
Improvement Division
P.O. Box 968
Santa Fe, New Mexico 87503

6. Additional Monitoring by the Permittee

If the permittee monitors any pollutant more frequently than required by this permit, using test procedures approved under 40 CFR 136 or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR. Such increased frequency shall also be indicated.

7. Averaging of Measurements

Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless other wise specified by the Director in the permit.

8. Retention of Records

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

9. Record Contents

Records of monitoring information shall include:

a. The date, exact place, time and methods of sampling or measurements;

b. The individual(s) who performed the sampling or measurements;

c. The date(s) analyses were performed;

d. The individual(s) who performed the analyses;

e. The analytical techniques or methods used; and

f. The results of such analyses.

10. Inspection and Entry

The permittee shall allow the Director, or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

a. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

c. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit, and

d. Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

SECTION D. REPORTING REQUIREMENTS

1. Planned Changes

The permittee shall give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility.

2. Anticipated Noncompliance

The permittee shall give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

3. Transfers

This permit is nontransferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Clean Water Act.

4. Monitoring Reports

Monitoring results shall be reported at the intervals and in the form specified in Section C, Paragraph C-5 (Monitoring).

5. Compliance Schedules

Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date. Any reports of noncompliance shall include the cause of noncompliance, any remedial actions taken, and the probability of meeting the next scheduled requirement.

6. Twenty-Four Hour Reporting

The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance. The Director may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

The following shall be included as information which must be reported within 24 hours:

a. Any unanticipated bypass which exceeds any effluent limitation in the permit.

b. Any upset which exceeds any effluent limitation in the permit.

c. Violation of a maximum daily discharge limitation for any of the pollutants listed by the Director in Part III of the permit to be reported within 24 hours.

7. Other Noncompliance

The permittee shall report all instances of noncompliance not reported under Section D, Paragraphs D-1, D-4, D-5, and D-6 at the time monitoring reports are submitted. The reports shall contain the information listed in Paragraph D-6.

8. Changes in Discharges of Toxic Substances

The permittee shall notify the Director as soon as it knows or has reason to believe:

a. That any activity has occurred or will occur which would result in the discharge of any toxic pollutant which is not limited in the permit, if that discharge will exceed the "notification levels" described in 40 CFR 122.61.

b. That they have begun or expect to begin to use or manufacture as an intermediate or final product or byproduct any toxic pollutant which was not reported in the permit application.

9. Duty to Provide Information

The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to the Director, upon request, copies of records required to be kept by this permit.

10. Duty to Reapply

If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit. The application should be submitted at least 180 days before the expiration date of this permit. The Director may grant permission to submit an application less than 180 days in advance but no later than the permit expiration date.

11. Signatory Requirements

All applications, reports or information submitted to the Director shall be signed and certified.

a. All permit applications shall be signed as follows:

(1) For a corporation: by a principal executive officer of at least the level of vice-president;

(2) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively; or

(3) For a municipality, State, Federal, or other public agency: by either a principal executive officer or ranking elected official.

b. All reports required by the permit and other information requested by the Director shall be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:

(1) The authorization is made in writing by a person described above.

(2) The authorization specified either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, or position of equivalent responsibility. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.); and

(3) Certification. Any person signing a document under this section shall make the following certification:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

12. Availability of Reports

Except for data determined to be confidential under 40 CFR Part 2, all reports prepared in accordance with the terms of this permit shall be available for public inspection at the offices of the State water pollution

control agency and the Regional Administrator. As required by the Act, permit applications, permits and effluent data shall not be considered confidential.

13. Penalties for Falsification of Reports

The Clean Water Act provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

PART III
OTHER CONDITIONS

1. The "daily average" concentration means the arithmetic average (weighted by flow value) of all the daily determinations of concentration made during a calendar month. Daily determinations of concentration made using a composite sample shall be the concentration of the composite sample. When grab samples are used, the daily determination of concentration shall be the arithmetic average (weighted by flow value) of all the samples collected during that calendar day.

The "daily maximum" concentration means the daily determination of concentration for any calendar day.

2. The term "24-hour composite sample" except for volatile organics means a sample consisting of a minimum of eight (8) grab samples of effluents collected at regular intervals over a normal operation day and combined proportional to flow, or a sample continuously collected proportional to flow over a normal operating day.

3. Test Procedures

a. The effluent characteristics "soluble radium 226" and "total radium 226" shall be measured by Method 706 "Radium 226 in Water" in accordance with the procedures discussed for soluble radium 226 and total radium 226 in Standard Methods for the Examination of Water and Wastewater, 14th Edition, 1975, pg. 667, or an equivalent method.

b. The effluent characteristic "Total Uranium" shall be measured by the procedure discussed in the HASL Procedural Manual, edition by John H. Harley, HASL 300 Health and Safety Laboratory, U.S. Atomic Energy Commission, 1973, pg. EU-03, or an equivalent method.

4. The following limitations shall apply

Part 2, of New Mexico Water Quality Control Commission Regulations, January 21, 1981, Section 2-101, General Requirements: number 2 in subsection A which reads "more than one daily composite sample in any thirty-day period (in which less than ten (10) daily composite samples are examined)" the Chemical Oxygen Demand (COD) shall be less than 125 mg/l.

5. The permittee shall determine if eighty (80) percent or greater of the culture of test organisms will survive by use of the "Range-Finding Screening Test," set out in "Methods for Measuring the Acute Toxicity of Effluents to Aquatic Organisms, "EPA-600/4-78-012 (Rev. July, 1978). Organisms for this test shall be Daphnia sp. if the effluent is less than five (5) parts per thousand salinity or Mysid sp. If the effluent is equal to or greater than five (5) part per thousand salinity. This screening test will be conducted within sixty (60) days of effectiveness of the biomonitoring requirements. Tests will be conducted once each quarter for a duration of two years utilizing a static method for 24 hours and following this dilution scheme only:

Effluent sample* - 100 percent by volume
Dilution water - 0 percent by volume

*24-hour composite; refrigerated after collection

If at any time during the two year testing period a test shows a survival of eighty (80) percent or less of the test organisms, the permittee shall within twenty-four (24) hours conduct a replacement static 48-hour median lethal concentration (LC50) test on the orginially collected sample. Replacement of effluent samples shall be once per 24 hours. Organisms for this test shall be Daphnia sp. if the effluent is less than five (5) parts per thousand salinity and reconstituted fresh water (EPA-600/4-78-012 Section 4) shall be used for dilution. If the effluent contains greater than five (5) parts per thousands salinity, Mysid sp. shall be used as the test organism, and reconstituted seawater will be used as dilution water (EPA-600/4-78-012 Section 4). The remaining LC50 methodology is available in EPA-600/4-78-012.

All screening and LC50 test results shall be reported with the Discharge Monitoring Reports. The test results should include the chemical and physical data as specified in Section 7 of EPA-600/4-78-012.

UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

REGION VI

IN THE MATTER OF:	*	
United Nuclear- Homestake Partners	*	
	*	INITIAL DECISION
Grants, New Mexico	*	
NPDES Permit NM 0020389	*	

FINDINGS

A. The Discharge

1. United Nuclear-Homestake Partners (UNHP) operates four uranium mines and a uranium milling facility in the vicinity of of Grants, New Mexico. [Stipulation.[1]/]

2. UNHP pumps groundwater infiltrating the mine shafts to the surface and diverts it to the milling facility for removal of leached uranium through ion exchange.[Stipulation.]

3. Although it recirculates much of the water through the mine for additional leaching, UNHP discharges approximately 936,000 gallons per day to Arroyo del Puerto. [Stipulation.]

4. The discharged water contains Radium 226, Uranium, Selenium, and Molybdenum. [Stipulation.]

B. The "Water"

1. Arroyo del Puerto is an arroyo or gully incised by the erosive action of water flowing over alluvial soils deposited in the San Mateo Valley in the geologic past. [Nylander, EPA-42.]

2. Approximately three and one half miles downstream from UNHP's discharge point, Arroyo del Puerto intersects San Mateo Creek, another arroyo. [Ganus, KM-1; Stipulation.]

3. From its junction with Arroyo del Puerto, San Mateo Creek continues in a southwesterly direction until it crosses the

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1/ The contentions of the parties and facts upon which they are based are substantially similar to those of another adjudication, In Re Kerr-McGee Nuclear Corporation, (NPDES Permit NM 0020542, March 10, 1981). The parties have stipulated that the hearing record in that case, together with supplementary information about UNHP's plant processes and discharge location, shall form the record herein.

line between Valencia and McKinley Counties near "Deadman's Curve," a bend in Highway 53. At "Deadman's Curve," the bed of the creek narrows as it passes through culverts under the highway. Below the highway, San Mateo Creek's channel loses its incised character, branching out into a wider braided configuration.[Nylander, EPA-42; Roundy, Tr. 376, EPA-18; AL-7.]

5. Below "Deadman's Curve," the braided channel of San Mateo Creek crosses the Bert Roundy Ranch, winter range for a cow-calf operation. Spreader dams obstruct the channel in this area. [Nylander, EPA-42; Roundy, Tr. 382; EPA-18; AL-7.]

6. Below the Bert Roundy Ranch, UNHP has erected a tailings pile in the bed of the arroyo, obstructing it. Although aerial photographs taken in 1935 show the channel continuing to Rio San Jose, subsequent agricultural and residential development associated with the town of Grants, New Mexico now obstructs the historical channel below the tailings pile. [Nylander, EPA-42; Robinson, SRI-43; SW-1; SW-4; EPA-18.]

C. Flow

1. In their natural states, Arroyo del Puerto and San Mateo Creek are ephemeral streams, containing surface flow only in response to episodic precipitation. As such flows travel down the arroyos, they are dimininished by evapotranspiration and infiltration. Thus, the distance that surface flow continues down the streams is primarily a function of the amount of precipitation. [Ganus, KM-1; Nylander, EPA-42.]

3. UNHP's discharge, comingled with the discharges of other uranium mining facilities on Arroyo del Puerto and San Mateo Creek, results in surface flow in San Mateo Creek to a point approximately 1.3 miles below its junction with Arroyo del Puerto, even in the absense of precipitation. [Ganus, KM-1.]

4. Occasional natural flows induced by precipitation transport UNHP's discharge further down San Mateo Creek. Thus, on various occasions, surface flow in the creek has reached "Deadman's Curve" [Carver, Tr. 340; Roundy, Tr. 375], spreader dams on the Bert Roundy Ranch [Roundy, Tr. 382], and the UNHP tailings pile [Roundy, Tr. 375].

5. On relatively rare occasions, precipitation contributes enough water to the surface flow in San Mateo Creek that it continues past the tailings pile, following roadbeds and flowing across open fields, gradually cutting a new channel in the process, until it reaches Rio San Jose near the Zuni View Trailer Park. Although such events are aperiodic, a local resident estimates their occurrence on the average of once every five years.[Robinson, SRI-43; Carver, Tr.344-347; Nylander, EPA-42.]

6. Some water infiltrating the channel of San Mateo Creek migrates through the underlying alluvium, approximately dup-

licating the course of the surface channel. At Horace Springs, this underground flow reemerges and enters Rio San Jose. [Ganus, KM-1, Km-2, Tr. 28; Nylander, EPA-42, Tr. 233; AL-4A; AL-4B; AL-4C.]

7. The travel time for this underground flow depends on the distance from its infiltration point to Horace Springs. UNHP's discharge takes between 154 and 1,000 years to migrate the 23 miles from its usual infiltration point 1.3 miles below the junction of Arroyo del Puerto and San Mateo Creek to Rio San Jose. When precipitation augments surface flow in San Mateo Creek, thus carrying the discharge further downstream, travel time is correspondingly less. [Nylander, EPA-42, Tr 232-233; Ganus, KM-2, Tr. 27-28.]

8. Rio San Jose flows into Rio Puerco, which flows into the Rio Grande. [Nylander, EPA-42; EPA-21.]

D. Commerce

1. The Bert Roundy Ranch is winter range for Mr. Roundy's cow-calf operation which produces 350-450 calves per year. [Roundy, Tr. 392.]

2. Mr. Roundy consigns some of the calves to the Karler Packing Company in Albuquerque for auction in the interstate cattle market. [Roundy, Tr. 372-373, 377-378; Nylander, EPA-42, Tr. 181-186; EPA-30A; EPA-30B; EPA-30C; EPA-32.]

3. Mr. Roundy uses spreader dams to divert surface flow in San Mateo Creek, thereby irrigating grass consumed by his cattle. [Nylander, EPA-42; Roundy, Tr. 382.]

4. Although Mr. Roundy's cattle drink from San Mateo Creek when water flows therein, they normally consume water derived from the alluvium underlying the creek. [Roundy, Tr. 380; Nylander, EPA-42, Tr. 181-182; AL-3B; AL4A; AL-4B; AL-6; EPA-37, EPA-38.]

5. The Rio Grande River is a navigable water of the United States. [Nylander, EPA-42.]

CONCLUSIONS

1. Pollution of Arroyo del Puerto is capable of affecting interstate commerce because:

a. Arroyo del Puerto is tributary to the Rio Grande, a navigable water of the United States, and

b. Arroyo del Puerto is tributary to San Mateo Creek, a stream affecting interstate commerce.

2. Under the Federal Water Pollution Control Act Amendments of 1972, 33 USC 1251, et seq, Arroyo del Puerto is a "navigable water."

DISCUSSION

The sole issue of this adjudication is whether or not Arroyo del Puerto is a "navigable water" as defined in the Federal Water Pollution Control Act Amendments of 1972 (FWCPA), 33 USC 1251, et seq, and thus subject to the regulatory authority of the United States Environmental Protection Agency (EPA). In essence, UNHP argues Arroyo del Puerto is not a "navigable water" because it does not regularly contribute surface flow to a navigable water of the United States, i.e., a water navigable in fact. This argument is unsupported by the law.

In FWCPA, the term "navigable waters" generally refers to all waters located within the geographic boundaries of the United States. United States v. Holland, 373 F.Supp. 665, 672 (M.D. Fla. 1974); United States v. Ashland Oil and Transportation Co., 364 F.Supp. 349, 351 (W.D. Ky. 1973), aff'd 504 F.2d 1317 (6th Cir. 1974); United States v. Phelps Dodge Corporation, 391 F. Supp. 1181, 1185 (D. Az. 1975). In determining whether or not a particular area is a "water" and thus included within this definition, the courts have adopted a functional approach, applying the term to geomorphic features capable of transporting pollutant laden water to an area in which interstate commerce may be affected.[2]/ Thus, the term has been applied to areas which are not always inundated, such as wetlands, P.F.Z. Properties, Inc. v. Train, 393 F. Supp. 1370 (D. D.C. 1975); manmade "mosquito canals" above mean high water level, United States v. Holland, supra; diked evaporation ponds, Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978); an intermittent stream, United States v. Texas Pipeline Co., 611 F.2d 345 (10th Cir. 1979); and a normally dry arroyo, United States v. Phelps Dodge Corporation, supra.

In United States v. Phelps Dodge Corporation, supra, the court explained this functional approach at 391 F.Supp. 1187:

> For the purposes of this Act to be effectively carried into realistic

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2/ EPA's General Counsel also takes this functional approach, opining that "navigable waters" are those, the pollution of which is capable of affecting interstate commerce. 2 Gen. Couns. Op. 139 (February 6, 1973). In former 40 CFR 125.1(p), EPA provided an exemplary list of such waters. Contrary to UNHP's assertions, that list does not purport to be nor is it exclusive. See In Re Ely, Nevada, 2 Gen. Couns. Op. 129 (NPDES Decision 30, September 18, 1975); In Re Phoenix, Arizona, 2 Gen. Couns. Op. 283 (NPDES Decision 53, December 17, 1976). Indeed, no administrative agency may lawfully narrow the scope of the statutory definition through regulation. N.R.D.C. v. Callaway, 392 F.Supp. 685, 686 (D. D.C. 1975).

> achievement, the scope of its control must extend to all pollutants which are discharged into any waterway, including normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest, including underground waters.

By definition, there is a public interest in navigable waters of the United States, i.e., waters navigable in fact. See e.g. United States v. Appalachian Electric Power Co.,311 U.S. 377, 404-405, 61 S.Ct. 291, 298 (1940). Thus, if the water flowing through Arroyo del Puerto reaches such a water, further evidence of interstate commerce is unnecessary to find the arroyo a "navigable water." See e.g. United States v. Texas Pipe Line Co., supra, at 611 F.2d 347.

Historically, water from Arroyo del Puerto flowed through San Mateo Creek, Rio San Jose, and Rio Puerco to the Rio Grande, a navigable river of the United States. Admitting that this tributary relationship existed in the past, UNHP contends that surface flow from San Mateo Creek into Rio San Jose now occurs too irregularly, if at all, to support regulatory jurisdiction.

In fact, such surface flow is a relatively rare event. Arroyo del Puerto and San Mateo Creek lose much of their surface water to evapotranspiration and infiltration, forces enhanced by the many obstructions which have been erected in the historic bed of the creek.[3]/ Nevertheless, upstream precipitation events occasionally generate enough flow so that a surface connection exists. Larry Carver, a long time resident of Grants, New Mexico who has observed such events,[4]/ estimates that they occur on an average of once every five years. (Carver, Tr. 336.] In cases involving intermittent or ephemeral streams like San Mateo Creek, however, the fact that a tributary relationship occurs "only once a year, or even less frequently," is irrele-

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[3]/ Although the presence of changed conditions or artificial obstructions to flow is irrelevant to a determination of "navigability" under FWPCA, P.F.Z. Properties v. Train, supra, at 393 F.Supp. 1380; In Re Central Illinois Public Service Co., 2 Gen. Couns. Op. 27 (NPDES Decision 7, April 8, 1975); In Re Phoenix, Arizona, supra, the record does not indicate how much more frequently the surface connection would exist in the absence of obstruction.

[4]/ UNHP speculates that Mr. Carver actually observed the waters of Lobo Creek, another arroyo which inundates Grants more frequently than San Mateo Creek. [Ganus, KM-2.] Mr. Carver's testimony, however, shows that he knows the difference between San Mateo Creek flooding and Lobo Creek flooding. [Carver, Tr. 349-351.]

vant. Jurisdiction is still present. In Re Phoenix, Arizona, supra at 2 Gen. Coun. Op. 290.

Even were there never surface flow between San Mateo Creek and Rio San Jose, the creek would still be a tributary of navigable waters of the United States. Water infiltrating the bed of San Mateo Creek is not "lost" to the Rio San Jose. All parties to this adjudication agree that at least some of this infiltrating water migrates through the shallow alluvium underlying San Mateo Creek to Horace Springs, where it reemerges and flows into the Rio San Jose. This subsurface connection independently supports a conclusion that Arroyo del Puerto is tributary to the Rio Grande and thus a "navigable water." See In Re Phoenix, Arizona, 2 Gen. Couns. Op. 405 (NPDES Decision 70, August 9, 1978).

It was unnecessary for EPA to trace the flow from Arroyo del Puerto as far as Rio San Jose in any event. San Mateo Creek and its underlying alluvium are themselves waters "in which there is some public interest" because their pollution could affect interstate commerce.

Bert Roundy runs a cow-calf operation, maintaining a more or less constant number of cows for breeding and selling the calves they produce. During Spring and Summer, Mr. Roundy's cattle graze near Bluewater, New Mexico. Around the first of September, Mr. Roundy moves his cattle to land adjacent to San Mateo Creek, between the county line and the United Nuclear Homestake Partner's tailings pile. About a month later, he cuts out the calves, 350 to 450 of which are shipped to Albuquerque or Belen, New Mexico for slaughter or auction in the interstate market. The cows and fewer than 20 calves retained for replacement breeding stock remain on the land adjacent to the creek until the following year. [Roundy, Tr. 380, 392, 395; Nylander, EPA-42; EPA-30.]

Water from San Mateo Creek plays an integral role in Mr. Roundy's cow-calf operation. Mr. Roundy and his father before him have built earthen "spreader" dams across the creek, thus checking the occasional flow of water therein and causing it to inundate and saturate a greater surface area. This primitive irrigation promotes the growth of grass, thus increasing the number of cattle that may forage on the land and, correspondingly, the number of cattle available for sale in the interstate market. [Roundy, Tr. 382.]

Although Mr. Roundy's cattle occasionally drink from San Mateo Creek, surface flow therein is too infrequent to be a reliable drinking water supply for them. Such a supply is provided by the alluvium underlying the creek, which is tapped by a number of wells on the ranch. It is most probable that Mr. Roundy uses these wells to water his cattle. [Roundy, Tr. 380; Nylander, EPA-42, Tr. 181-182; AL-3B; AL-4A; AL-4B; AL-6; EPA-37; EPA-38.]

Pollution of the waters of San Mateo Creek or the underlying alluvium would affect Mr. Roundy's operation and the interstate cattle industry of which it is part. Without a reasonably clean water supply for watering and irrigation, such a business could not survive or contribute cattle to the interstate market.5/

Mr. Roundy's ranch is, of course, only an example demonstrating the manner in which pollution of San Mateo Creek and the alluvium beneath it could affect interstate commerce. Because of the slowness of underground flow through the alluvium, its pollution by UNHP's discharge will have little, if any, effect on the present ranching operation. Nevertheless, such pollution could affect similar commerce in the future. Accordingly, San Mateo Creek and its tributary, Arroyo del Puerto, are "navigable waters" which FWPCA mandates EPA protect.

March 11, 1981

Frances E. Phillips

FRANCES E. PHILLIPS
Acting Regional Administrator

5/ To establish San Mateo Creek's potential effect on interstate commerce, it is unnecessary that cattle have been transported across state lines after quaffing alluvial waters or eating irrigated grass. See e.g. Wickard v. Filburn, 317 U.S. 111, 127-128, 63 S.Ct. 82, 90-91 (1942); Maryland v. Wirtz, 392 U.S. 183, 192-193, 88 S.Ct. 2017, 2022 (1968). It is here noted, however, that Mr. Roundy's cattle operation formerly used pastures in Colorado as summer range and shipped stock to feedlots in Kansas and Nebraska. [Roundy, Tr. 372, 380, 395.]

CERTIFICATE OF SERVICE

I, Linda Murphree, do hereby certify that on March 12th, 1981, a true and correct copy of the Regional Administrator's Initial Decision was served by U. S. Mail - Certified, Return Receipt Requested - on the following parties:

Honorable Marvin E. Jones Administrative Law Judge EPA Region 7 324 East 11th Street Kansas City, MO 64106	Certified # 625362
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Linda Murphree
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Regional Hearing Clerk
Region 6